

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

_____ X
THE CITY OF HUNTINGTON, : Civil Action
Plaintiff, : No. 3:17-cv-01362
v. :
AMERISOURCEBERGEN DRUG :
CORPORATION, et al., :
Defendants. :
_____ X
CABELL COUNTY COMMISSION, : Civil Action
Plaintiff, : No. 3:17-cv-01665
v. :
AMERISOURCEBERGEN DRUG :
CORPORATION, et al., :
Defendants. :
_____ X

BENCH TRIAL - VOLUME 8
BEFORE THE HONORABLE DAVID A. FABER, SENIOR STATUS JUDGE
UNITED STATES DISTRICT COURT
IN CHARLESTON, WEST VIRGINIA

MAY 12, 2021

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1 PROCEEDINGS had before The Honorable David A. Faber,
2 Senior Status Judge, United States District Court, Southern
3 District of West Virginia, in Charleston, West Virginia, on
4 May 12, 2021, at 9:00 a.m., as follows:

5 THE COURT: Dr. McCann, we'll ask you to come
6 forward, sir.

7 Do you have anything else, Mr. Schmidt?

8 MR. SCHMIDT: A little bit more, Your Honor, if I
9 may. May I proceed?

10 THE COURT: Good morning, Dr. McCann.

11 THE WITNESS: Good morning, Your Honor.

12 MR. SCHMIDT: May I proceed, Your Honor?

13 THE COURT: Yes.

14 MR. SCHMIDT: Thank you.

15 BY MR. SCHMIDT:

16 Q. Dr. McCann, I'm going to try to briefly wrap up the
17 final lines of questioning. Thanks for bearing with us
18 for yet another day.

19 I'd like to pick up on the discussion we had yesterday
20 about ARCOS data and what you, what you were able to learn
21 or not learn about what DEA can do with their ARCOS data.

22 And I want to return to your testimony about the fact
23 that you looked at some DEA documents by showing you
24 something from the DEA website that was a presentation in
25 2011.

1 MR. SCHMIDT: May I approach, Your Honor?

2 THE COURT: Yes.

3 THE WITNESS: Thank you.

4 MR. SCHMIDT: Pleasure.

5 BY MR. SCHMIDT:

6 **Q.** And if we could, Dr. McCann, let's just put the
7 front page up on the screen. This is Defendants' West
8 Virginia 642 Exhibit. On the front screen we see the
9 DEA logo and you can see this is a presentation about
10 ARCOS. Do you see that?

11 **A.** Yes.

12 **Q.** Turn to the second page. The presentation was given in
13 2011 by a DEA agent named Kyle Wright, Unit Chief, Targeting
14 and Analysis with responsibility for ARCOS. Are you
15 familiar with Mr. Wright?

16 **A.** No.

17 **Q.** You didn't -- he wasn't one of the folks you talked to
18 or had communications with?

19 **A.** I didn't know any of the individuals' names, but that
20 name doesn't ring a bell.

21 **Q.** Did you read his testimony in this case?

22 **A.** No.

23 **Q.** Let's look at Page 16, please. Do you see where it
24 says "trends, sample charts"?

25 **A.** Yes.

1 **Q.** And then if you look after this -- after that page do
2 you see that there's a series of illustrative charts that
3 he's put together for his 2011 presentation?

4 **A.** Yes.

5 **Q.** If you look at the first one on Page -- and I'm using
6 the page numbers in the bottom left corner after the exhibit
7 number, Page 17 which is also up on the screen.

8 **A.** Yes.

9 **Q.** Do you see that? And do you see that this shows that
10 the DEA was able to use ARCOS data to track state and
11 national trends month over month?

12 **A.** That ability seems to be illustrated here. I don't
13 know if this reflects actual data or not. But the ability
14 or the concept appears to be illustrated here.

15 **Q.** And, by the way, do you see how these numbers, the U.S.
16 and the state level are, are going up in this illustration?

17 **A.** Yes.

18 **Q.** Are you -- as part of your work, did you study the DEA
19 quota, the limit that the DEA sets on the amount of
20 prescription opioids that manufacturers can make in a given
21 year?

22 **A.** No.

23 **Q.** Did you study the fact that the quota always rose
24 throughout the time that you say distribution was rising?

25 **A.** No.

1 **Q.** Do you have an understanding as to the fact that when
2 the DEA sets the quota, they're setting it based on
3 estimated medical, scientific research dates?

4 **A.** I'm not aware of how they set the quota.

5 **Q.** Okay. Let's continue on to Page 18, please. Do you
6 see that this indicates ARCOS analysis on a per capita
7 basis?

8 **A.** At least illustrates that, yes.

9 **Q.** If we turn to Page 20, do you see that this illustrates
10 using ARCOS data to conduct analyses at a zip code level
11 including whether a given zip code is above or below average
12 or average?

13 **A.** Yes.

14 **Q.** If we turn to Page 21, do you see that this shows the
15 DEA using ARCOS data to analyze distribution at a county
16 level, again in terms of whether it's average, above
17 average, or below average?

18 **A.** Yes.

19 **Q.** And if we look at 24, just as a final illustration, do
20 you see that this shows the DEA using ARCOS data to analyze
21 a specific type of prescription opioid with a specific
22 pharmacy, again comparing that pharmacy to, in this case,
23 the state average and the U.S. average?

24 **A.** Yes.

25 **Q.** Okay.

1 MR. SCHMIDT: For good order, Your Honor, we'd
2 move this into evidence, Defendants' West Virginia 642.

3 MR. MOUGEY: We object, Your Honor. There's no
4 foundation laid. The witness has never seen the document.
5 You've ruled already multiple times getting third-party
6 documents in through an expert witness is inappropriate.

7 THE COURT: Well, I think he can question him
8 about it. Overruled.

9 Go ahead, Mr. Schmidt.

10 MR. MOUGEY: I'm sorry. I thought Mr. Schmidt
11 just moved to enter it into evidence as opposed to
12 questioning about it.

13 THE COURT: Did you move it into evidence?

14 MR. SCHMIDT: Yes, I did, Your Honor.

15 THE COURT: How is it admissible through this
16 witness?

17 MR. SCHMIDT: I think it's the type of DEA
18 document he looked at in terms of educating himself about
19 ARCOS and learning how ARCOS works.

20 THE COURT: Was he able to specifically identify
21 it?

22 MR. SCHMIDT: He was not. And I'll ask the
23 question and maybe if he can't identify it, I'll move it in
24 through someone else.

25 BY MR. SCHMIDT:

1 Q. Have you seen this document at all? Did you look
2 at this document in terms of coming to this, these
3 opioid cases not knowing about ARCOS and trying to learn
4 about ARCOS and what DEA could do about it?

5 **A.** No, not this document or any other PowerPoint
6 presentation on the DEA website.

7 MR. SCHMIDT: Then I'll reserve that, Your Honor.

THE COURT: All right.

9 BY MR. SCHMIDT:

10 Q. Let's go to that matrix that you were asked about.
11 Let's go to the matrix if we could, if I could just get
12 my copy.

13 Do you have yours in front of you, sir?

14 **A.** I do, yes.

15 Q. Okay. It's P-43225. And I want to just quickly orient
16 us to this document.

17 If we go to Page 13 of the document, we see McKesson
18 for oxycodone and -- let me see if I can make this work
19 again.

We see McKesson oxycodone, 2006 to 2014, national, West Virginia, Huntington averages, the four pharmacies we've talked about in Huntington, four Rite-Aid pharmacies, and then a number of pharmacies outside of Huntington, outside of Huntington/Cabell. Is that correct?

25 **A.** Yes.

1 Q. And some of these pharmacies outside of
2 Huntington/Cabell are in West Virginia. One is in Ohio.
3 One is in Kentucky. Correct?

4 **A.** Yes.

5 Q. If we then go to Page 16 -- and this chart, in
6 particular, continues for a few pages. And if we go to Page
7 17, there's a new chart. This time it's hydrocodone, same
8 national, West Virginia -- not the same averages. Now
9 they're for hydrocodone, but national, West Virginia, and
10 Huntington averages; correct?

11 **A.** Correct.

Q. Same four pharmacies; correct?

13 **A.** Correct.

14 Q. And then, again, you've got a group of pharmacies.
15 Some of them are the same as for oxycodone. Some of them
16 are different. Correct?

17 **A.** Correct.

18 Q. Did you select these pharmacies for inclusion on the
19 chart, both these ones on Page 16 and the ones that are on
20 Page 13?

21 | A. No.

Q. Did you personally select them?

23 | A. No.

Q. Who selected them?

25 **A.** My understanding is counsel.

1 **Q.** And what was the criteria you understand counsel used
2 to select them?

3 **A.** I don't know.

4 **Q.** Our best estimate is that these are literally the
5 pharmacies in West Virginia, -- let's go back to 13 if we
6 could, please -- in West Virginia and then in nearby parts
7 of Ohio and Kentucky that have the highest monthly averages
8 that could possibly be found. Do you know if that's true or
9 not?

10 **A.** No, I don't.

11 **Q.** What about the ones in Huntington/Cabell? Do you know
12 why those ones were selected by counsel?

13 **A.** No.

14 **Q.** If I tell you we believe those are the ones that had
15 the highest overall volume, do you know whether that's true
16 or not?

17 **A.** No.

18 **Q.** So to dig into these numbers a little bit, if -- let me
19 ask you to look at just one thing if I may, Dr. McCann. If
20 I look at the numbers for oxycodone in Huntington/Cabell, do
21 you have that number there in front of you? The
22 2.8 million?

23 **A.** Yes.

24 **Q.** And if we go to Page 16 and do the same for the
25 1.6 million, Huntington/Cabell, do you see that number?

1 **A.** I do, yes.

2 **Q.** You can tell by looking at those numbers that you've
3 again excluded the V.A. Hospital shipments as well as some
4 other shipments; correct?

5 **A.** Right, to McKesson's credit. I'm focusing only on the
6 retail and chain pharmacies not including the roughly
7 80 percent of the shipments that came to the V.A.

8 **Q.** Now, if we stick with this slide and -- 16 and look at
9 the average monthly hydrocodone shipments into
10 Huntington/Cabell County, it's 2,102; correct?

11 **A.** Yes.

12 **Q.** That's roughly half the levels, or more than half the
13 levels of West Virginia and roughly half the levels
14 nationally; correct?

15 **A.** Correct.

16 **Q.** If we go back to 13 and look at the same data for
17 oxycodone, it's a little higher in terms of the average for
18 Huntington-Cabell, the national, and West Virginia, but
19 they're close; correct?

20 **A.** They're about the same as the average. Rather than
21 half as much as it was for hydrocodone, they're roughly the
22 same average within Huntington City and Cabell County as for
23 the state and for the country.

24 **Q.** Okay. You spent some time yesterday talking about the
25 Rite-Aid pharmacies in detail, so I'm not going to go back

1 into those pharmacies. I would like to ask you just a few
2 questions about the other pharmacies.

3 And I counted 16 pharmacies between Page 13 and Page 16
4 that were unique and not in Huntington/Cabell. Is that the
5 correct count?

6 **A.** I didn't count them, but that sounds right.

7 **Q.** And that means that on this chart, four-fifths of the
8 pharmacies you discussed are outside Huntington/Cabell;
9 correct?

10 **A.** Well, I didn't discuss them all, but you're right. It
11 would seem that roughly four-fifths of the pharmacies on
12 these two charts are outside of the City of Huntington and
13 Cabell County.

14 **Q.** If we look at just to that point I was asking you
15 about, these being the largest volume pharmacies or largest
16 average monthly pharmacies that could be found in West
17 Virginia and the region, if we look at these average numbers
18 along the second row starting with the 25,002 for Crab
19 Orchard going all the way over to the 27,876 for Broadway
20 Clinic, every single one of those is larger than the
21 national average, the West Virginia average, the
22 Huntington/Cabell average by several factors. Correct?

23 **A.** Yes.

24 **Q.** In some instances by -- what's the largest variation
25 just if you could help me with the math? I guess it would

1 be this 27,000 or the 32,000 I guess. What's the variation
2 between 32,000 and the Huntington/Cabell average?

3 **A.** It's not, not quite eight times as much.

4 **Q.** Okay. Do you agree that, that by definition with that
5 variation in the numbers they do not reflect the national
6 average?

7 **A.** Well, I wouldn't compare it to Huntington/Cabell to say
8 they don't, they don't compare to the national average, but
9 I agree they're substantially higher than the national
10 average.

11 **Q.** Okay. Each one of them is outside the national
12 average. Let me rephrase if I could. Each one of them is,
13 is higher -- is outside the national average by a factor of,
14 of several times. Correct?

15 **A.** Correct.

16 **Q.** Each one of them is outside the West Virginia national
17 average by a factor of several times; correct?

18 **A.** Correct.

19 **Q.** And each one of them is outside the Huntington/Cabell
20 average by a factor of several times; correct?

21 **A.** Correct.

22 **Q.** Just for completeness, if we go to slide 16, please,
23 which is the oxycodone numbers, we see the same thing. And,
24 in fact, here, just to give us a comparison, how much bigger
25 is this first one, Family Discount, than Huntington/Cabell

1 in terms of factor difference between them? How much larger
2 is it roughly?

3 **A.** Well, it's more than 50 times as big.

4 **Q.** And, so, same set of questions. And in an effort to
5 streamline, I'll ask you them all at once. Is it true that
6 each of these selected non-Huntington pharmacies on Page 16
7 are larger than the national, West Virginia, and
8 Huntington/Cabell averages by, by quite a margin?

9 **A.** Yes.

10 **Q.** And it's safe to say that these pharmacies, both on
11 Page 16 and on Page 13, were not picked because they were
12 close to the national average, the West Virginia average, or
13 the Huntington/Cabell average?

14 **A.** I don't know why they weren't picked, but it would seem
15 they were not picked for that reason.

16 **Q.** Is there anything about these pharmacies that you would
17 point me to on Page 16 or Page 13 in saying these reflect
18 national average, county average, state average?

19 **A.** No. As you suggest, I don't think they were intended
20 to reflect average pharmacies.

21 **Q.** Okay. Let's go back to 13, please. And on Page 13
22 you'll see that at the top and the same is true on Page 16,
23 the location of these pharmacies. And that's where you can
24 see some of them on different counties in West Virginia,
25 some of them are outside of West Virginia. Do you see that?

1 **A.** Yes.

2 **Q.** Do you know of any geographic commonality that led to
3 the selection of those pharmacies other than the fact that
4 some of them are in the State of West Virginia and some of
5 them are close to the State of West Virginia?

6 **A.** No.

7 **Q.** Do you know of any geographic commonality between those
8 pharmacies and Huntington/Cabell other than some of them are
9 in the State of West Virginia, some of them are close to
10 West Virginia?

11 **A.** No.

12 **Q.** And just to take a concrete example, one of these
13 pharmacies is a Rite-Aid in Hancock County. Do you see that
14 one?

15 **A.** Yes.

16 **Q.** Do you know where Hancock County is in the State of
17 West Virginia?

18 **A.** No.

19 **Q.** Do you know how far it is from Huntington?

20 **A.** No.

21 **Q.** I'm going to ask you, if you could, just to keep that,
22 that demonstrative in front of you, P-43225. I'm going to
23 show a map of the State of West Virginia if we could.

24 Do you recognize the State of West Virginia here
25 with -- we've only highlighted Cabell. Of course,

1 Huntington is crossing the Cabell line. Do you recognize
2 this as a map of the State of West Virginia?

3 **A.** Yes.

4 **Q.** And if we highlight where Hancock is up at the top, do
5 you know how far away that is from the City of Huntington or
6 from Cabell County?

7 **A.** No.

8 **Q.** If you look back at 43225, the matrix, if we look at
9 that again and if you go to Page 1 for ABDC, there's a
10 pharmacy called Moundsville. It's the third non-Huntington
11 pharmacy listed for ABDC.

12 **A.** Yes.

13 **Q.** It's in Marshall County. Do you know how far that is
14 from Huntington/Cabell?

15 **A.** No.

16 **Q.** And let's just keep the map up if we could,
17 Mr. Reynolds.

18 Could we go back to the map and show where Marshall
19 County is?

20 And you didn't measure the distance from there to
21 Cabell, did you?

22 **A.** I did not.

23 **Q.** Two more and then I'll, I'll be done with this.

24 If we look back at your exhibit -- let's keep the map
25 up. But if we look back at your exhibit at Page 13 back to

1 the McKesson section, there's a pharmacy called Four Seasons
2 in Mercer County. And we can show that on the map just
3 where that is, Dr. McCann. Do you know how far that is from
4 Huntington/Cabell?

5 **A.** No.

6 **Q.** And last one. If we look at Page 7 of your chart for
7 Cardinal, there's a pharmacy called -- there's actually
8 three pharmacies, but I'll just focus on one in Jefferson
9 County. There's a pharmacy called CVS 1428 in Jefferson
10 County. Do you see that on Page 7?

11 **A.** Yes.

12 **Q.** And could we show where Jefferson County is on the map?
13 That's actually closer to where you work in the Washington,
14 D.C. suburbs than the 350 miles it is to Cabell. Do you see
15 that?

16 **A.** I do, yes.

17 **Q.** Is there -- now I'm asking about all these pharmacies
18 that are outside Huntington/Cabell. Is there any link you
19 know of between these pharmacies or the others and
20 Huntington/Cabell? Any geographic link?

21 **A.** Well, with your addendum geographic link, I would have
22 to say "no" other than they're in West Virginia. There are
23 other links between them, but geographically the only
24 commonality I see is that they're in West Virginia.

25 **Q.** And for any of those pharmacies that are outside

1 Huntington/Cabell did you identify any patients from
2 Huntington/Cabell who went to one of those pharmacies?

3 **A.** No. We don't have data on that.

4 **Q.** In your work on McKesson, did you see that it had
5 supplied over 50,000 pharmacies over the past few decades at
6 various points in time?

7 **A.** I don't recall the number for any particular
8 distributor. I have the numbers for each distributor, so I
9 had that number in my mind fleetingly perhaps at one time.
10 I don't recall what the number is. But it might be, it
11 might be that number higher or lower.

12 **Q.** Do you know what the order of magnitude is? Is it tens
13 of thousands?

14 **A.** Yes, certainly tens of thousands.

15 **Q.** Okay. And we talked a moment ago about how there are
16 16 pharmacies outside Huntington/Cabell that are featured on
17 this matrix?

18 **A.** Yes.

19 **Q.** If the number is 50,000, what percentage of those
20 50,000 national pharmacies were featured on the matrix,
21 roughly, if you could, 16 over 50,000? And I don't mean to
22 put you on the spot trying to calculate it. I can give you
23 the calculator.

24 **A.** I might prefer a calculator for that, but it's
25 something like three one thousandths of a percent.

1 Q. And if it's just 10,000, can you give us a rough
2 estimate?

3 **A.** If it's just 10,000 -- well, one percent would be 100.
4 And, so, it would be fifteen hundredths of a percent.

5 | Q. Okay.

A. So .15 percent.

7 Q. Thank you, Dr. McCann. That's all I have for right
8 now. I appreciate your time.

9 THE COURT: Ms. Salgado.

10 MS. SALGADO: One minute, please, as we switch our
11 technical.

12 THE COURT: Yes.

13 | (Pause)

14 CROSS EXAMINATION

15 BY MS. SALGADO:

16 Q. Good morning, Dr. McCann.

17 A. Good morning.

18 Q. Thanks for your patience over these last few days. I'm
19 Suzanne Salgado. I represent Cardinal Health and I'll ask
20 you just a few more questions.

A. Thank you.

22 Q. Dr. McCann, as part of your work as an expert in this
23 case, you prepared tables that reflect your analysis of the
24 market share of each of the wholesale distributors in Cabell
25 County and the City of Huntington. Is that right?

1 **A.** I don't know if I would describe it as analysis, but
2 calculations of the market shares. Again, they're really
3 subtotals of the data, and we do that for the distributors
4 for various jurisdictions including Cabell County and the
5 City of Huntington.

6 **Q.** Okay. I'm going to show you one of those charts and
7 those set of calculations. It's from your Appendix 9-I and
8 it's Page 25 of that that I'll bring up here. But let me
9 know if you'd like a hard copy and we can provide you with
10 that as well.

11 **A.** Thank you.

12 **Q.** Now, this table presents your analysis -- or excuse
13 me -- your calculations, subtotals of some of the data
14 regarding total dosage units of oxycodone and hydrocodone
15 shipped by all distributors to all dispensers in
16 Cabell/Huntington from 2006 to 2014; correct?

17 **A.** Correct.

18 **Q.** And that analysis, as you said, is based on ARCOS data;
19 right?

20 **A.** Yes. It might be supplemented a little bit with
21 defendant transaction data, but the primary source is the
22 ARCOS data.

23 **Q.** Now, according to your analysis of the ARCOS data and
24 any supplementation you may have done, from 2006 to 2014
25 Cardinal Health distributed 17 percent of the oxycodone and

1 hydrocodone shipped to Cabell and Huntington; correct?

2 **A.** Correct.

3 **Q.** And it's your understanding that Cardinal Health
4 reported those transactions to the DEA in the ARCOS
5 database; correct?

6 **A.** Correct.

7 **Q.** So Cardinal Health knew about the 17 percent of the
8 oxycodone and hydrocodone prescription opioids that were
9 shipped into Cabell and Huntington during that time frame;
10 correct?

11 **A.** Yes.

12 **Q.** And as far as you know, -- and the DEA -- excuse me --
13 on the other hand knew about all of the oxycodone and
14 hydrocodone prescription opioids shipped into
15 Cabell/Huntington during that time frame; correct?

16 **A.** Correct.

17 **Q.** And I think we discussed this a little bit yesterday,
18 but as far as you're aware, at least before 2018, other than
19 the data on the volume -- or excuse me -- other than
20 Cardinal Health's own shipments, a distributor would not
21 have had access to the data that other wholesale
22 distributors reported to ARCOS; correct?

23 I'll rephrase. You're not aware of Cardinal Health
24 having access to the data of other distributors during this
25 time frame; correct?

1 **A.** Correct.

2 **Q.** Dr. McCann, yesterday you were referring to some
3 tables -- or excuse me -- a table showing the pharmacies in
4 Cabell and Huntington that received shipments of oxycodone
5 and hydrocodone between 2006 and 2014. And I want to go
6 through one of those.

7 If we could please pull up P-44752 and go to the second
8 page of that document.

9 I'd like to focus in particular on A-Plus Care Pharmacy
10 listed here. According to your chart, how many dosage units
11 of oxycodone and hydrocodone were shipped to A-Plus Care
12 Pharmacy?

13 **A.** 583,000.

14 **Q.** And how many MMEs of oxycodone and hydrocodone were
15 shipped to A-Plus Care Pharmacy according to your chart?

16 **A.** 17,365,587.

17 **Q.** And A-Plus Care Pharmacy is listed here because it is
18 in Cabell, right, or it was in Cabell?

19 **A.** Correct.

20 **Q.** But you didn't testify about which distributor sold
21 oxycodone and hydrocodone to A-Plus Care Pharmacy during
22 Mr. Mougey's questioning of you; right?

23 **A.** I don't recall discussing this pharmacy.

24 **Q.** Let me show you a table that you prepared as part of
25 your expert materials before you came to testify. In

1 particular, I'm going to look at Appendix 9-H to your expert
2 report and Page 84 of that pdf. This chart that you
3 prepared reflects opioid shipments to A-Plus Care Pharmacy;
4 correct?

5 **A.** Yes.

6 **Q.** According to your chart, A-Plus Care Pharmacy received
7 shipments of oxycodone and hydrocodone exclusively from
8 Miami-Lukens, a different distributor; correct?

9 **A.** Correct.

10 **Q.** According to your chart, A-Plus Care Pharmacy did not
11 receive any shipments from AmerisourceBergen, Cardinal
12 Health, or McKesson; correct?

13 **A.** Correct.

14 **Q.** Miami-Lukens is not a defendant in this trial, is it?

15 **A.** Not that I'm aware of.

16 **Q.** In compiling your analysis and opinions did you
17 consider that according to the DEA, A-Plus Care Pharmacy was
18 the third largest seller of oxycodone in West Virginia for
19 2014?

20 **A.** I'm sorry. Could you repeat that again?

21 **Q.** Sure. In compiling your analysis and opinions in this
22 case, did you consider that according to the DEA, A-Plus
23 Care Pharmacy was the third largest seller of oxycodone in
24 West Virginia for 2014?

25 **A.** Yes, at least the substance of what the DEA would know

1 because we're both looking at the DEA and, and I -- we're
2 both looking at the shipments from distributors of oxycodone
3 and hydrocodone into this pharmacy.

4 I don't, I don't have any knowledge of any statement by
5 the DEA or any classification or ranking of these
6 pharmacies.

7 So I guess the direct answer would be -- to your
8 question would be "no," but I think literally I'd know the
9 same thing.

10 **Q.** So you were -- you had the information available to
11 determine that it was one of the largest sellers of
12 oxycodone in West Virginia for 2014?

13 **A.** Yes. It's reflected in these voluminous appendices.

14 **Q.** But you didn't testify about it during plaintiffs'
15 questioning of you at trial; correct?

16 **A.** Correct.

17 **Q.** Dr. McCann, some of the charts you presented show
18 changes in the volume of opioids shipped to particular
19 pharmacies at particular times. I'm going to walk through a
20 couple of those.

21 Your analyses revealed that the pharmacy customers that
22 each distributor serviced changed over time at various
23 points; correct?

24 **A.** Yes.

25 **Q.** For example, and we'll talk about this in just a moment

1 in a little more detail, the Fruth Pharmacy chain was a
2 customer of AmerisourceBergen until around 2010 when Fruth
3 became a customer of Cardinal Health. Do you recall that?

4 **A.** I don't recall the details, but I recall pharmacies,
5 including Fruth, changing distributors.

6 **Q.** And a distributor's shipments to a particular
7 jurisdiction may rise or fall depending on how many
8 customers that distributor serviced in that jurisdiction at
9 any particular time; correct?

10 **A.** Yes.

11 **Q.** So at times, a distributor's total shipments to a
12 particular jurisdiction may decrease, at least in part,
13 because a customer stopped ordering from that distributor
14 and started ordering from a different distributor; correct?

15 **A.** Yes.

16 **Q.** And, conversely, sometimes a distributor's total
17 shipments to a given jurisdiction may increase, at least in
18 part, because a customer started ordering from that
19 distributor as opposed to a different one; correct?

20 **A.** Yes.

21 **Q.** Let's look back at a chart that you reviewed I believe
22 on Monday. And that's on P-44711, Page 29.

23 Dr. McCann, this reflects your calculations of
24 oxycodone and hydrocodone dosage units per capita by
25 distributors into Cabell and Huntington; is that right?

1 **A.** Yes.

2 **Q.** I want to draw your attention to the 2009 and 2010 time
3 frame. According to your chart, AmerisourceBergen's
4 distributions of hydrocodone and oxycodone into Cabell and
5 Huntington decreased around that time frame; is that right?

6 **A.** Yes.

7 **Q.** And during that same time frame, Cardinal Health's
8 distributions increased; correct?

9 **A.** Correct.

10 **Q.** And the amount by which AmerisourceBergen's
11 distributions decreased was roughly similar to the amount by
12 which Cardinal Health's distributions increased. Is that
13 fair?

14 **A.** Yes.

15 **Q.** And we discussed that you were aware of certain
16 pharmacies changing suppliers, and I want to talk in
17 particular about Fruth Pharmacy. You're generally familiar
18 with the Fruth Pharmacy chain; correct?

19 **A.** I am, yes.

20 **Q.** Are you aware it's a family-owned West Virginia based
21 pharmacy chain that's been in business since the 1950s?

22 **A.** No, I'm not aware of those details. I've just driven
23 past some and recognized the sign.

24 **Q.** You presented some detailed charts showing
25 distributions to the Fruth Pharmacies in Cabell-Huntington;

1 correct?

2 **A.** Yes.

3 **Q.** And broken down by distributor as to some of those
4 charts; correct?

5 **A.** Correct.

6 **Q.** I just want to pull up a couple of those examples,
7 P-44752, Page 15, as well as Page 18.

8 The chart on the left shows your analysis of
9 hydrocodone shipments to the Fruth Pharmacies in Cabell and
10 Huntington; correct?

11 **A.** Yes.

12 **Q.** And before 2010, almost all distributions were coming
13 from AmerisourceBergen based on the data that you present
14 here; correct?

15 **A.** Yes.

16 **Q.** And starting in around 2010, almost all distributions
17 were coming from Cardinal Health based on this data; right?

18 **A.** Yes.

19 **Q.** And the chart on the right shows your analysis of
20 oxycodone shipments to those same pharmacies during the same
21 time frame; correct?

22 **A.** Yes.

23 **Q.** And, similarly, before 2010 almost all distributions
24 were coming from AmerisourceBergen and that switches over to
25 Cardinal Health after that point; is that right?

1 **A.** Yes.

2 **Q.** So based on your analysis in these two graphs, the
3 Fruth Pharmacies shift to Cardinal Health in 2010 didn't
4 cause the total shipment to Fruth Pharmacies to increase; is
5 that right?

6 **A.** Correct.

7 **Q.** In fact, distributions to them after 2010 generally
8 appear to decrease over time; correct?

9 **A.** More clearly so for hydrocodone, but sometime later
10 almost with respect to oxycodone.

11 **Q.** And then going back to 44711, Page 29, the Fruth
12 Pharmacy shift to Cardinal Health did cause Cardinal
13 Health's total shipments to Cabell and Huntington to
14 increase because Cardinal Health gained a customer; correct?

15 **A.** Correct.

16 **Q.** But the actual shipments to that customer were
17 relatively unchanged; is that right?

18 **A.** Correct.

19 **Q.** Now, sticking with this chart for a moment, I'd like to
20 draw your attention now to the gray lines that reflect
21 shipments from distributors other than Cardinal Health,
22 AmerisourceBergen, and McKesson. Those gray lines start in
23 2006 and stop in 2014; correct?

24 **A.** Yes.

25 **Q.** And that's not because those are the only years in

1 which other distributors shipped oxycodone or hydrocodone to
2 Cabell and Huntington; correct?

3 **A.** Correct.

4 **Q.** They just are reflective of those years because those
5 are the only years for which you had ARCOS information;
6 correct?

7 **A.** Correct.

8 **Q.** And you didn't have any non-ARCOS distribution data
9 from other distributors not in this courtroom; right?

10 **A.** At least not, not in this jurisdiction, that's correct.

11 **Q.** So -- okay. So 2006 through 2014 were the only years
12 in this jurisdiction for which you had data for distributors
13 other than Cardinal Health, AmerisourceBergen, and McKesson;
14 correct?

15 **A.** Yes, I believe that's correct.

16 **Q.** Focusing now on the red line reflecting distributions
17 from Cardinal Health, that line goes farther back in time
18 than all of the other lines, all the way back to 1996;
19 correct?

20 **A.** Correct.

21 **Q.** And that's because Cardinal Health produced data going
22 back to 1996 while others did not; right?

23 **A.** That's my understanding.

24 **Q.** The data from ABDC appears to start here around 2002;
25 correct?

1 **A.** Yes.

2 **Q.** And for McKesson, that data goes back to around 2004?

3 **A.** Yes.

4 **Q.** So for Cardinal Health, you had at least six years of
5 data that you did not have for any other distributor; is
6 that right?

7 **A.** Correct.

8 **Q.** And you have no idea how Cardinal Health's
9 distributions during that time period compare to shipments
10 from any other distributor; correct?

11 **A.** Correct.

12 **Q.** Looking now at the 2014 to '15 time frame, Cardinal's
13 distributions in 2015 are higher than they were in 2014;
14 correct?

15 **A.** I'm sorry. Could you ask that again, please?

16 **Q.** Sure. Cardinal Health's distributions in 2015 are
17 higher than they were in 2014; correct?

18 **A.** Yes.

19 **Q.** And I believe you testified about this briefly that
20 you're aware of the -- something about a rescheduling of one
21 of the drugs, hydrocodone; is that correct?

22 **A.** Yes.

23 **Q.** So are you aware that CVS, a chain pharmacy, stopped
24 distributing hydrocodone products to its own pharmacies in
25 Cabell-Huntington in late 2014 when that rescheduling

1 happened, and Cardinal Health became the CVS Pharmacy's main
2 supplier of hydrocodone products after that time?

3 **A.** I don't recall the precise details, but I recall
4 generally that the chain pharmacies that were
5 self-distributing stopped self-distributing hydrocodone
6 around that time and switched to these, these three major
7 distributors for the hydrocodone needs.

8 **Q.** Okay. Let's look briefly at one of the charts that
9 reflects some of those more specific distributions.

10 P-44748, Page 13.

11 THE COURT: Ms. Salgado, I'm sorry. I've got to
12 interrupt you. We need to make an early court reporter
13 switch to accommodate one of the other judges, and also my
14 real-time is on the blink. So --

15 MS. SALGADO: I want to make sure you're
16 following. We're happy to take a break.

17 THE COURT: Let's keep it to 10 minutes subject to
18 what the technicians have to do.

19 MS. SALGADO: No problem.

20 (Recess taken at 9:46 a.m.)

21 THE COURT: Okay, Ms. Salgado. Salgado. I keep
22 mispronouncing your name.

23 MS. SALGADO: No, you got it right.

24 THE COURT: Did I get it right that time?

25 MS. SALGADO: You got it completely right. Thank

1 you.

2 BY MS. SALGADO:

3 **Q.** Okay, take two. We're all set. Thank you so much.

4 Welcome back, Dr. McCann.

5 **A.** Thank you.

6 **Q.** I want to refer you to one of the charts you put
7 together regarding distributions to CVS Pharmacies in
8 Cabell-Huntington building off of what we were just
9 discussing before the break. So, let's look at P-4478, Page
10 13, please. So, this chart shows your analysis of
11 hydrocodone distributions to I believe it's four CVS
12 Pharmacies in Cabell and Huntington; is that correct?

13 **A.** Yes.

14 **Q.** And before October, 2014, most of the hydrocodone that
15 was being shipped to CVS Pharmacies in Cabell and Huntington
16 were being self-distributed by CVS itself shown in orange on
17 the graph, correct?

18 **A.** Yes. Or yellow, yes.

19 **Q.** Oh, fair enough. It printed a little orange for me,
20 but it looks a little yellower there. And the CVS data only
21 goes back to 2006 because of the time frame of the ARCos
22 data, correct?

23 **A.** Correct.

24 **Q.** And Cardinal Health's distributions are shown in red
25 here, correct?

1 **A.** Correct.

2 **Q.** And before October, 2014, Cardinal Health was shipping
3 just a small fraction of the total amount of hydrocodone
4 going to these CVS Pharmacies, right?

5 **A.** Yes.

6 **Q.** And we discussed just before the break that you were
7 generally familiar with the rescheduling of the hydrocodone,
8 right?

9 **A.** Correct.

10 **Q.** And you're aware of the fact that the DEA moved
11 hydrocodone combination products from a Schedule III drug to
12 a Schedule II drug around October, 2014, correct?

13 **A.** That's generally my understanding, yes.

14 **Q.** And are you generally aware that there are additional
15 physical security requirements relating to the distribution
16 of Schedule II products that do not apply to Schedule III
17 products?

18 **A.** No, I'm not aware of those differences.

19 **Q.** So, the very same month that the hydrocodone -- excuse
20 me that hydrocodone -- was rescheduled, around October,
21 2014, as we see in your graph, CVS stopped self-distributing
22 to its stores in Cabell and Huntington and after that date
23 Cardinal Health provided most of the distributions, right?

24 **A.** Correct.

25 **Q.** And the CVS Pharmacies shipped to Cardinal Health did

1 not cause the total hydrocodone shipments to those
2 pharmacies to increase, right?

3 **A.** Correct.

4 **Q.** And in general -- or excuse me. The hydrocodone
5 shipments, according to your graph, tended to go down over
6 time after October, 2014, correct?

7 **A.** Correct.

8 **Q.** So, this shift did cause Cardinal Health's total
9 shipment of hydrocodone to increase to Cabell-Huntington in
10 that time frame because Cardinal Health gained a portion of
11 CVS's business, correct?

12 **A.** Correct.

13 **Q.** But it didn't cause additional hydrocodone shipments to
14 go to those pharmacies, right?

15 **A.** Not any more than had been previously shipped by CVS as
16 a self-distributor, that's correct.

17 **Q.** Okay. Dr. McCann, just moving on to another topic
18 briefly, you testified that the ARCOS data that you reviewed
19 appeared to be missing data from Cardinal Health from March,
20 2008; do you recall that?

21 **A.** Yes.

22 **Q.** You have no idea whether those transactions are missing
23 because Cardinal Health did not report them, or because of
24 an error on DEA's end, or some other reason, correct?

25 **A.** Correct.

1 **Q.** And the absence of that March, 2008 data did not
2 prevent you from concluding that the ARCOS data accurately
3 and reliably reflected Cardinal Health's distributions,
4 correct?

5 **A.** Correct. I think I may have articulated it in slightly
6 different ways in different contexts and at different times,
7 but what I determined was that the shipments from
8 manufacturers and distributors to dispensers in the ARCOS
9 data appear to be complete and the data reliable.

10 **Q.** Let's talk a little bit more about your analysis of the
11 ARCOS data. Part of your assignment in this case was to
12 process, validate and augment the ARCOS data produced by the
13 DEA and internal transactional data produced by defendants,
14 correct?

15 **A.** Correct.

16 **Q.** And you explained in some of your earlier testimony
17 some of the steps you took to validate that data, including
18 comparing it against defendants' data, correct?

19 **A.** Correct.

20 **Q.** And you also testified about some of the steps you took
21 to augment the data, right?

22 **A.** Correct.

23 **Q.** I want to focus now on some of the steps you took after
24 that to process the data. You explain in Appendix II of
25 your report some of the corrections you made to the ARCOS

1 data and, according to your description, you made eight
2 types of changes to the produced ARCOs data; is that
3 correct?

4 **A.** They're not all corrections, but -- and I don't recall
5 the precise number, but there are item -- there's an
6 itemized list in that appendix of the things that we did to
7 narrow down the overall dataset to the shipments of opioids
8 that we then subtotalled.

9 **Q.** Sure. If we could pull up the appendix, please,
10 Appendix II. I believe it's Paragraph 156. You described
11 them as eight types of changes, correct?

12 **A.** Correct.

13 **Q.** And one of those changes was excluding certain
14 transactions that you determined were duplicate transactions
15 in the ARCOs data, right?

16 **A.** Correct.

17 **Q.** You also checked the accuracy of the calculated base
18 weight in grams in the ARCOs data and found that some were
19 incorrectly calculated in ARCOs; is that right?

20 **A.** That's a very tiny number but, yes, some.

21 **Q.** But that's -- that is correct?

22 **A.** Yes.

23 **Q.** And you corrected the calculated base weight in grams,
24 in particular, I think I'm looking on Paragraph 162 of your
25 report. 285,891 reported transactions; is that right?

1 **A.** I don't recall the precise number, but that sounds
2 approximately right.

3 Q. If we could just pull up Paragraph 162, please, on Page
4 109. And there it is. So, it says you corrected the
5 calculated base weight in grams for 285,891 reported
6 transactions; is that right?

7 **A.** Yes. The full sentence includes .06% of the total
8 transactions, that's correct.

9 **Q.** Right. But I'm just confirming that the number 285,891
10 is correct; is that right?

11 **A.** Correct.

12 Q. And you created a table showing all of the exclusions
13 and corrections that you made to the ARCO data; is that
14 right?

15 **A.** Correct.

16 Q. And in total, let's see, if we could please bring up
17 the Page 114, the bottom, or we can just leave it there.
18 You determined it was appropriate to exclude over 61 million
19 transactions, right?

20 A. Correct.

21 8. Okay. Good with that. Thank you.

22 Dr. McCann, as to the testimony you have provided
23 regarding distribution of opioid medications, the only
24 Cardinal Health information that you reviewed was Cardinal's
25 distribution data and the DEA data that included Cardinal's

1 distributions, correct?

2 **A.** I think the answer is yes, but I may not understand
3 your question. Would you ask it again, please?

4 **Q.** Sure. Dr. McCann, as to the testimony you've provided
5 regarding distribution of opioid medication, the only
6 Cardinal Health information you reviewed was Cardinal's
7 distribution data and the DEA data that included Cardinal's
8 distributions; is that right?

9 **A.** I think very narrowly interpreted to mean in my
10 analysis of -- or summaries of Cardinal Health shipments, I
11 only looked at the ARCOS data reflecting those shipments and
12 the defendant production from Cardinal. I think the answer
13 is yes, if that's what you mean.

14 **Q.** Yes. You didn't look into how Cardinal Health uses its
15 own data to monitor its customers' purchases, correct?

16 **A.** Correct.

17 **Q.** And that's the same for ABDC?

18 **A.** Correct.

19 **Q.** And that's the same for McKesson?

20 **A.** Correct.

21 **Q.** Dr. McCann, broadly speaking, you analyzed in various
22 ways the volume of opioid medications shipped by
23 AmerisourceBergen, Cardinal Health and McKesson, right?

24 **A.** Yes.

25 **Q.** And your analysis covered the distribution of 14 types

1 of opioid medications, correct?

2 **A.** Yes.

3 **Q.** And much of your analysis focused only on distribution
4 of two specific opioid medications, oxycodone and
5 hydrocodone, correct?

6 **A.** I don't think that's correct. I think that out of
7 roughly 10,000 pages of exhibits to my expert report include
8 exhibits on -- on all of the drugs, sometimes grouped as 14,
9 sometimes as 12, sometimes as two, sometimes individually.
10 I think that roughly 50 or 100 exhibits that we walked
11 through here in the courtroom, they all dealt with either
12 oxycodone or hydrocodone. Only a few dealt with all of the
13 14 drugs.

14 **Q.** Okay. So, you agree that your testimony that's been
15 elicited by the plaintiffs in court here has largely been
16 around the distribution of oxycodone and hydrocodone,
17 correct?

18 **A.** Yes.

19 **Q.** Your analysis and charts do not show us the
20 non-controlled medications that distributors shipped,
21 correct, so non-opioid substances or non-controlled
22 substances?

23 **A.** Correct. I don't have that data, that's correct.

24 **Q.** Are you aware that the data for distribution of
25 non-controlled substances into Cabell-Huntington was

1 produced by Cardinal Health in this case?

2 **A.** I'm not aware of that.

3 **Q.** Are you aware that it was produced by other defendants
4 in this case?

5 **A.** I am not aware of that.

6 **Q.** So, the lawyers didn't ask you to do that analysis,
7 correct?

8 **A.** Correct.

9 **Q.** So, for a pharmacy with a high volume of oxycodone and
10 hydrocodone shipments into Cabell and Huntington, your
11 analysis doesn't tell us anything about whether they also
12 received a high volume of other medications like blood
13 pressure or cholesterol medications, right?

14 **A.** Correct.

15 **Q.** Moving on to a different topic, Dr. McCann, you're
16 aware that the DEA regulates the supply chain for controlled
17 substances, correct?

18 **A.** Right.

19 **Q.** And I believe you talked about it a little bit, but are
20 you aware that the DEA decides how much of each opioid
21 medication like oxycodone or hydrocodone can be made by
22 manufacturers each year?

23 **A.** If you're referring to what I know very generally as
24 quotas, then the answer is yes. I don't know if that
25 characterization is consistent with my understanding of the

1 quotas, but I understand the DEA publishes something that is
2 supposed to put an upper bound on the amount of opioids
3 produced.

4 **Q.** And you understand that when the DEA sets a quota, that
5 authorizes production of a certain amount of medication and
6 no more, correct?

7 **A.** That's generally my understanding. I don't really know
8 anything in any detail about how these quotas work but,
9 generally, that's my understanding.

10 **Q.** And are you aware that the DEA is required by law to
11 set the quota at the amount needed to meet legitimate
12 medical need?

13 **A.** No. I don't know what the requirements are for setting
14 the quotas.

15 **Q.** But you do understand that distributors cannot ship any
16 more prescription opioids than are manufactured each year
17 pursuant to the DEA quota, correct?

18 **A.** I'm sorry. Could you ask that again please?

19 **Q.** You understand that distributors cannot ship any more
20 prescription opioids that are manufactured pursuant to the
21 DEA quota, correct?

22 **A.** Well, really independent of the quota, they can't ship
23 more drugs than are manufactured, that's correct.

24 **Q.** Are you aware that the DEA increased the quota for
25 prescription opioids that could be manufactured almost every

1 year from 1993 until 2013?

2 **A.** I don't recall that detail. I recall seeing in perhaps
3 one of your expert's reports perhaps in an earlier case a
4 graph of these quotas that appear to be increasing through
5 time, but I don't recall the details.

6 **Q.** So, you don't -- you're not recalling that, by 2013,
7 the quota limit for oxycodone was about 40 times greater
8 than it was in 1993?

9 **A.** Correct.

10 **Q.** But you said you are familiar with graphs showing the
11 general increase in quotas over time; is that right?

12 **A.** Correct.

13 **Q.** Let's take a look at one of those graphs. Just for
14 demonstrative purposes, I'm going to show you a graph of the
15 DEA's aggregate quota for oxycodone over time in kilograms
16 and this is from the DEA OIG's report, a publicly available
17 document published in 2019. If we could please pull that
18 up.

19 So, let's focus on the 1997 to 2010 time period.

20 According to this graph, in 1997, the quota was less than
21 10,000 kilograms, correct?

22 **A.** Yes.

23 **Q.** And, in 2010, it was more than 100,000 kilograms,
24 right?

25 **A.** Yes.

1 **Q.** Would you agree with me that this chart shows that the
2 DEA aggregate production quota for oxycodone in 2010 was at
3 least ten times greater than it was in 1997?

4 **A.** Yes.

5 **Q.** You testified about several other charts that showed
6 distributions of oxycodone and hydrocodone by all
7 distributors to all dispensers from 1997 to 2019; do you
8 recall that?

9 **A.** Yes.

10 **Q.** Let's pull up Plaintiffs' 44711, Page 4, please. This
11 is one of your charts and it represents shipments of
12 oxycodone and hydrocodone reflected in the ARCOS Retail Drug
13 Summary Reports converted by you into MMEs for the entire
14 United States, correct?

15 **A.** Correct.

16 **Q.** You've testified that this chart showed that from 1997
17 to 2010 the volume of oxycodone and hydrocodone for the
18 entire United States increased by approximately ten or
19 eleven-fold; do you recall that?

20 **A.** Yes.

21 **Q.** Let's pull up Plaintiffs' Exhibit 44711, Page 8,
22 please. This chart represents shipments of oxycodone and
23 hydrocodone also reflected in the ARCOS Retail Drug Summary
24 Reports and converted by you into MMEs for the entire State
25 of West Virginia; is that right?

1 | A. Yes.

2 Q. You testified that this chart shows that from 1997 to
3 2010 the volume of oxycodone and hydrocodone shipped to the
4 entire State of West Virginia increased also by
5 approximately ten or eleven-fold; do you recall that?

6 **A.** Yes.

7 Q. So, the magnitude of the increase was approximately the
8 same for the State of West Virginia as it was for the United
9 States as a whole, correct?

10 | A. Yes.

11 Q. Let's pull up P-44711, Page 11, please. This chart
12 represents shipments of oxycodone and hydrocodone also
13 reflected in the ARCOS Retail Drug Summary Reports and
14 converted by you into MMEs for the three-digit zip codes in
15 West Virginia that encompass Cabell and Huntington, correct?

16 **A.** Yes.

17 Q. And you testified that this chart shows that from 1997
18 to 2010 the volume of oxycodone and hydrocodone shipped to
19 the three-digit zip codes that encompass Cabell and
20 Huntington also increased by approximately ten-fold; do you
21 recall that?

22 A. Yes.

23 Q. So, the magnitude of the increase was approximately the
24 same in Cabell-Huntington as it was for the State of West
25 Virginia, as well as the United States as a whole, correct?

1 **A.** Correct.

2 **Q.** So, across the DEA oxycodone quota and your analysis of
3 total distributions of oxycodone and hydrocodone to the
4 United States, West Virginia, and Cabell, and Huntington,
5 the trend is the same, we see about a ten-fold increase; do
6 you agree?

7 **A.** Yes.

8 **Q.** If we could pull up the demonstrative putting those
9 side-by-side. So, that's why when you look at these charts
10 together, you see the similar upward slope from 1997 to
11 2010, correct?

12 **A.** I'm sorry. What do you mean by "that's why"?

13 **Q.** Because it's a similar factor, because it's the same
14 factor of ten, we see a similar trend across all of these
15 graphs, correct?

16 **A.** I'm sorry. Yes. The -- the graphs all reflect a
17 roughly ten-fold increase and so, visually, they appear to
18 have the same slope.

19 **Q.** Okay. Now, you created these -- the charts that you
20 made, the ones that the orange and blue lines, using
21 publicly available information from the ARCOS Retail Drug
22 Summary Reports, correct?

23 **A.** Yes.

24 **Q.** And you accessed those reports on-line?

25 **A.** Yes.

1 **Q.** Those Retail Drug Summary Reports reflect distributions
2 to each state broken up by three digit zip code within that
3 state year by year and quarter by quarter, right?

4 **A.** Correct.

5 **Q.** And you testified that those Retail Drug Summary
6 Reports, which date back to 1997, have been publicly
7 available for many years, potentially as early as 1998,
8 correct?

9 **A.** Correct.

10 **Q.** So, individuals in Cabell and Huntington, law
11 enforcement, public health officials, City Council members,
12 Cabell County Commissioners, could have access to this
13 publicly available information of quarterly shipments to the
14 255 and 257 zip codes when it was posted, correct?

15 **A.** I don't know one way or another, but I don't know any
16 reason why not.

17 **Q.** You don't know any reason why not, right?

18 **A.** Correct.

19 **Q.** You can take that back down. Thank you.

20 Many of the charts and graphs you testified about with
21 Mr. Mougey reflect your calculation of how many prescription
22 opioids were shipped to jurisdictions on a per capita basis;
23 do you recall that?

24 **A.** Yes.

25 **Q.** So, let's discuss briefly the per capita calculations

1 that you -- that you did. For West Virginia, you calculated
2 MMEs per capita for West Virginia and other states based on
3 the publicly available Retail Drug Summary Reports with data
4 going back to 1997, correct?

5 **A.** Correct.

6 **Q.** And you testified that the MMEs per capita was higher
7 in West Virginia than it was in many other states, correct?

8 **A.** Correct.

9 **Q.** And that was true across the graph even in the early
10 years as far back as the late '90s before prescriptions and
11 distributions increased significantly across the country,
12 right?

13 **A.** I don't have that early part of the graph visually in
14 my mind right now, but that may be the case.

15 **Q.** Let's pull up Plaintiffs' 44711, Page 6, please. Do
16 you agree that, as far back as the late '90s, the MMEs per
17 capita was higher in West Virginia than it was in many other
18 states in the country according to your chart?

19 **A.** Yes.

20 **Q.** And you understand, don't you, that a larger proportion
21 of West Virginia's population suffers from conditions that
22 cause pain, correct?

23 **A.** I'm not aware of that beyond just a general
24 understanding that that's been asserted. I don't know that
25 that's -- whether that's true or not.

1 **Q.** Okay. Let's talk about the per capita calculations you
2 did specifically for Cabell and Huntington. You did those
3 calculations by dividing the total number of MMEs
4 distributed to pharmacies in Cabell and Huntington by the
5 population of Cabell and Huntington residents in the Census
6 data you reviewed, correct?

7 **A.** Correct.

8 **Q.** And you testified that you're aware that Cabell County
9 is a healthcare hub for the surrounding area, correct?

10 **A.** Just generally. Again, I understood that to be
11 asserted and I saw some City of Huntington/Cabell County
12 website claiming that. I have no reason to doubt it.

13 **Q.** Okay. And are you aware from that, or otherwise, that
14 people from the broader Huntington/Ashland Metro area come
15 into Cabell County and Huntington for medical treatment?

16 **A.** I've heard that said. I don't know. I don't have any
17 personal knowledge of that.

18 **Q.** Okay. But you have no idea how many patients who lived
19 outside of Cabell and Huntington got their prescriptions
20 filled there, correct?

21 **A.** Correct. That type of data is available, but I don't
22 have that data.

23 **Q.** Okay. Dr. McCann, you provided testimony about
24 distributions to a number of pharmacies outside of Cabell
25 and Huntington and I'm going to ask you a few more follow-up

1 questions. I know we've already discussed this a few times.

2 If we could please pull up P-43225, Page 7. I just
3 want to look at the headers here with the pharmacies that
4 you identified outside of Cabell and Huntington. This chart
5 reflects data and analysis regarding oxycodone distributions
6 to specific pharmacies in Cabell Huntington and as reflected
7 on the chart here, 13 select pharmacies that are not located
8 in Cabell or Huntington, correct?

9 **A.** Correct.

10 **Q.** And I think we looked at a few examples in your
11 testimony earlier this morning, but several of the select
12 pharmacies here are in the Eastern Panhandle of West
13 Virginia, aren't they?

14 **A.** I'm sorry. I'm not really familiar with the counties
15 in West Virginia.

16 **Q.** So, you're not aware that Hancock and Brooke Counties
17 are in the Eastern Panhandle?

18 **A.** Correct.

19 **Q.** Are you aware that a couple of these pharmacies are in
20 the Northern Panhandle?

21 **A.** No. Same answer.

22 **Q.** Okay. So, you're not aware that Berkeley County and
23 Jefferson County are in the Northern Panhandle?

24 **A.** Right.

25 **Q.** Let's take a look at another page of your analysis.

1 THE COURT: You've got your panhandles backwards
2 here.

3 MS. SALGADO: Oh, excuse me. I'm sorry. Thank
4 you, Judge. Thank you.

5 THE WITNESS: Apparently, neither of us are.

6 BY MS. SALGADO:

7 **Q.** Let's take a look at the next page, please. Let's take
8 a look at the headers for these outside of Cabell and
9 Huntington pharmacies.

10 MS. SALGADO: Now, we don't have to worry about
11 panhandles here for this one, I think, Your Honor.

12 BY MS. SALGADO:

13 **Q.** But I do know that three of those pharmacies are in
14 Harrison County, correct?

15 **A.** Yes.

16 **Q.** And according to my math, that's about 170-mile drive
17 from Huntington. Are you aware of that?

18 **A.** No.

19 **Q.** You also presented information and analysis regarding
20 other pharmacies outside of Cabell and Huntington in what
21 we've referred to as some of the pharmacy-specific packets,
22 correct?

23 **A.** Yes.

24 **Q.** So, by my count, you presented data and analysis on 21
25 pharmacies that are located outside of Cabell and Huntington

1 to which Cardinal Health shipped oxycodone or hydrocodone;
2 does that sound correct?

3 **A.** Yes.

4 **Q.** And for all of the pharmacies you selected outside of
5 Cabell and Huntington, you just analyzed Cardinal Health's
6 shipments of oxycodone or hydrocodone, correct?

7 **A.** Well, it mischaracterizes my prior testimony a little
8 bit. I didn't select these pharmacies, but the pharmacies
9 that are listed on here are only on the oxycodone and
10 hydrocodone versions of these charts. I don't have similar
11 charts for other opioids.

12 **Q.** Okay. So, just to clarify for the pharmacies that
13 counsel selected for you, you just analyzed Cardinal
14 Health's shipments of oxycodone and hydrocodone in these
15 charts, correct?

16 **A.** Correct.

17 **Q.** And --

18 THE COURT: Can I interrupt you for a minute?

19 MS. SALGADO: Please.

20 THE COURT: I'm unclear as to how -- what criteria
21 was used to select the pharmacies here? I mean, obviously,
22 there are a whole lot more pharmacies in the area than the
23 ones that are depicted on the chart. How did these
24 pharmacies on the chart make the chart?

25 THE WITNESS: Well, I can give you my general

1 understanding. We were given these, as what I understand to
2 be illustrative choices by counsel of illustrative examples
3 of bad behavior on the part of the distributors in Cabell
4 County and the City of Huntington and in the counties
5 outside. So, these are not all of the pharmacies and
6 they're not intended to be selected randomly, I don't
7 believe. I think that they're intended to show that there
8 -- that the problems with the pharmacies that are identified
9 in Cabell County and Huntington City are not unique to
10 Cabell County and Huntington City, but part of a broader
11 problem with the supervision of the distribution of drugs by
12 these distributors. That's my general understanding.

13 I didn't choose these pharmacies, but that's -- that
14 was what I understand the purpose of the exhibit is, to be
15 used with other witnesses to provide testimony about the
16 compliance and supervision issues.

17 MS. SALGADO: Your Honor, I'm just going to object
18 to his characterization of bad behavior by distributors and
19 his understanding as to how this is illustrative.

20 THE COURT: I'll overrule that. Just so I'll be
21 clear, who selected the pharmacies that you included in the
22 chart?

23 THE WITNESS: Counsel.

24 THE COURT: Counsel for the plaintiffs?

25 THE WITNESS: Correct.

1 THE COURT: Okay.

2 BY MS. SALGADO:

3 **Q.** As to these pharmacies outside of Cabell and Huntington
4 that the distributors here serviced, you didn't look at the
5 data on these distributors' distribution of non-controlled
6 substances to those pharmacies, correct?

7 **A.** Correct.

8 **Q.** So, you don't know whether Cardinal Health also
9 distributed above average volume of other medications,
10 right?

11 **A.** Correct.

12 **Q.** And the same is true for ABDC?

13 **A.** Correct.

14 **Q.** And the same is true for McKesson?

15 **A.** Correct.

16 **Q.** And you, in fact, have no way of knowing the volume of
17 other medications that Cardinal Health distributed to those
18 pharmacies because Cardinal Health has not produced data on
19 its distribution of non-controlled substances for pharmacies
20 located outside of Cabell and Huntington, correct?

21 **A.** I'm not aware of that data being produced.

22 **Q.** Are you aware that for pharmacies and non-pharmacy
23 customers in Cabell and Huntington the plaintiffs requested
24 and Cardinal Health produced extensive data and numerous
25 types of documents reflecting diligence regarding those

1 customers and their orders?

2 **A.** No, I'm not aware of that.

3 **Q.** And so, you're not aware of that as to
4 AmerisourceBergen, as well?

5 **A.** Correct.

6 **Q.** And you're not aware of that as to McKesson?

7 **A.** Correct.

8 **Q.** Are you aware that plaintiffs did not request the same
9 type of data and diligence documents regarding Cardinal
10 Health's customers outside of Cabell and Huntington in this
11 case?

12 **A.** I apologize. I may have -- I may have agreed to the
13 sort of sequence of questions about the three distributors
14 just now too quickly. Would you ask me that question again?
15 It's re-playing in my mind and I'm not sure that I
16 understood it the first time I answered.

17 **Q.** I'm happy to -- yeah, happy to make sure we're all on
18 the same page here, so I will repeat the first question I
19 asked, which was are you aware that for pharmacies and
20 non-pharmacy customers in Cabell and Huntington the
21 plaintiffs requested and Cardinal Health produced extensive
22 data and numerous types of documents reflecting diligence
23 regarding those customers and their orders?

24 **A.** Yes, I did answer too quickly. I know generally that
25 the plaintiffs requested what I -- what I have heard

1 described as due diligence files. And so, if that is
2 encompassing the data and numerous types of documents you
3 reference in your question, then I know that generally those
4 due diligence files were requested.

5 I think not just for Huntington City and Cabell County,
6 but more broadly, and -- and I understand that those files
7 have been produced, or at least some version of what I'm
8 calling due diligence files were produced. I've received
9 and seen some of them.

10 So, rather than answer as I did to that series of three
11 questions, I probably should have given the opposite answer.
12 I didn't understand the question the first time you asked
13 it.

14 **Q.** That's okay. And due diligence files, as you call
15 them, I think are -- or diligence files are part of what I'm
16 talking about, but are you aware that plaintiffs requested
17 and defendants produced many other types of documents and
18 data reflecting diligence in this case?

19 **A.** I don't know anything beyond what I would describe as
20 due diligence files.

21 **Q.** Are you aware, for example, that defendants ran in
22 their e-mails of their anti-diversion personnel search terms
23 specific to the pharmacies and customers in
24 Cabell-Huntington so that they produced e-mail files that
25 reflect discussions and diligence of those customers? Were

1 you aware of that?

2 **A.** Yes, although I would have grouped down in what I
3 thought of as due diligence files. I have some general
4 understanding of that. I didn't review those files myself
5 personally, but I have some general understanding of them
6 being produced.

7 **Q.** Are you aware also of the production of data beyond
8 general distribution data? So, for example, data showing
9 every time a threshold is changed or every time there is the
10 exceedence (sic) of a threshold? Are you aware that that
11 type of data was produced for defendants' customers in
12 Cabell and Huntington?

13 **A.** I have some general understanding. I don't recall
14 reviewing those documents specifically in this case. I
15 think I have reviewed similar documents in related cases. I
16 just am not placing them in this case.

17 **Q.** Okay. So, are you aware then that plaintiffs did not
18 request the same type of data and diligence documents
19 regarding distributors' customers outside of Cabell and
20 Huntington in this case?

21 **A.** I'm not aware one way or the other.

22 **Q.** So, are you aware that Cardinal Health and other
23 defendants did not produce the same type of data or
24 documents reflecting diligence for customers outside of
25 Cabell and Huntington in this case?

1 **A.** No. I'm not aware of that one way or the other.

2 **Q.** Moving on to a different topic, Dr. McCann, let's cull
3 up Plaintiffs' Exhibit 71128, please, and I'd like to focus
4 in particular on the Cardinal Health pie chart here.

5 Dr. McCann, you testified about this chart -- I believe
6 it was back on Monday, many moons ago, correct?

7 **A.** Yes.

8 **Q.** And you explained that this shows for each defendant
9 which distribution center has shipped oxycodone and
10 hydrocodone to Cabell-Huntington, right?

11 **A.** Yes.

12 **Q.** So, looking at the chart you made for Cardinal, this
13 shows that 99.55% of the oxycodone and hydrocodone that
14 Cardinal Health shipped into Cabell-Huntington was shipped
15 from Cardinal Health's Wheeling, West Virginia distribution
16 center. Do you see that?

17 **A.** Yes.

18 **Q.** And it further shows which distribution centers account
19 for the remaining .45% of oxycodone and hydrocodone that
20 Cardinal shipped into Cabell-Huntington, right?

21 **A.** Yes.

22 **Q.** And you have identified in this chart every
23 distribution center that appeared in the ARCos data and
24 Cardinal Health's produced data that shipped oxycodone or
25 hydrocodone into Cabell-Huntington, right? That's the

1 source of your data?

2 **A.** Correct.

3 **Q.** And so, as far as you're aware, there were no other
4 Cardinal Health distributions other than those identified
5 here that shipped any oxycodone or hydrocodone into
6 Cabell-Huntington during this time frame, correct?

7 **A.** Correct, or at least these are the last Cardinal
8 Distribution Center before the drug arrived in Cabell County
9 and the City of Huntington. It could be that drug came from
10 some distribution center other than Wheeling, West Virginia
11 to Wheeling, West Virginia and then into the county, but
12 this is -- all three of these pie charts are reflecting the
13 last distribution center in the chain before the drugs
14 entered Cabell County and City of Huntington.

15 **Q.** So, for example, a drug might be shipped from a
16 national logistics center to a regional distribution center
17 before being shipped to a customer, correct?

18 **A.** Correct.

19 **Q.** But you're not aware of any distributions from any
20 other distribution centers directly other than what's
21 reflected here, correct?

22 **A.** Correct.

23 **Q.** And you've provided the names and locations for some of
24 the distribution centers identified. For example, Niagra
25 Falls, New York appears at the bottom of the page, correct?

1 **A.** Yes.

2 **Q.** And for other of the distribution centers, you didn't
3 provide the names or locations, but you did provide the
4 unique DEA registration number, correct?

5 **A.** Correct.

6 **Q.** And each of those numbers corresponds to an
7 identifiable distribution center, right?

8 **A.** Correct.

9 **Q.** And you may not have identified it, but it would be
10 possible to be identified, correct?

11 **A.** Correct. I'm not sure why the city and state is not on
12 this for those two or three -- three that just have the DEA
13 number.

14 **Q.** Okay. So --

15 THE COURT: Excuse me. Dr. McCann, did the
16 documentation that was furnished to you include the
17 shipments to every pharmacy by these three defendants in
18 West Virginia, for example?

19 THE WITNESS: Yes, Your Honor.

20 BY MS. SALGADO:

21 **Q.** On this chart, if none of these -- assuming none of
22 these DEA registration numbers corresponds to Cardinal
23 Health's distribution center in Lakeland, Florida, then that
24 means, according to your analysis, the Cardinal Health
25 distribution center in Lakeland didn't ship any hydrocodone

1 or oxycodone to Cabell-Huntington, correct?

2 THE COURT: I'm sorry to interrupt again.

3 MS. SALGADO: That's okay.

4 THE COURT: I didn't ask the precise question I
5 wanted you to answer. I asked you if the data included the
6 shipments of every pharmacy. What I meant to ask was did it
7 show the specific shipments to each specific pharmacy?

8 THE WITNESS: Oh, yes. The data is -- if you
9 visualized it, it would be millions of lines of data, each
10 line showing a specific shipment of a specific drug package
11 from -- from a distributor and identifying which
12 distribution facility it came from to a specific pharmacy.
13 It will give the pharmacy's DEA number and the physical
14 location of the pharmacy, as well as the name and some other
15 information, but that's for every single shipment into
16 Cabell County and the City of Huntington.

17 THE COURT: Okay. I'm sorry to interrupt you.

18 MS. SALGADO: That's okay. No problem.

19 BY MS. SALGADO:

20 Q. Just back on this, Dr. McCann, I believe you answered
21 this, but making sure we're clear, that if none of the DEA
22 registration numbers on this chart corresponds to Cardinal
23 Health's Lakeland, Florida distribution center, then that
24 means, according to your analysis, the Cardinal Health
25 Lakeland Distribution Center did not ship any oxycodone or

1 hydrocodone into Cabell-Huntington, correct?

2 **A.** At least not directly into Cabell County and the City
3 of Huntington.

4 **Q.** And the same is true for Cardinal Health's Auburn,
5 Washington facility?

6 **A.** Yes. Same answer, not directly, at least into Cabell
7 County and the City of Huntington.

8 **Q.** And the same is true for Cardinal Health's Swedesboro,
9 New Jersey Distribution Center?

10 **A.** Correct.

11 **Q.** And the same is true for Cardinal Health's Stafford,
12 Texas Distribution Center, correct?

13 **A.** Correct.

14 **Q.** Dr. McCann, you're not aware of any shipment by any
15 distributor in this courtroom to a pharmacy that was not
16 registered with the DEA and licensed by its state regulator,
17 correct?

18 **A.** Correct.

19 **Q.** And of all the distributor shipments that you've
20 analyzed, you're not aware of a single shipment shipped to a
21 pharmacy without an order placed by that pharmacy for that
22 shipment, correct?

23 **A.** Correct.

24 MS. SALGADO: That's all I have. Thank you so
25 much.

1 Thanks, Your Honor.

2 THE WITNESS: Thank you.

3 THE COURT: Any redirect?

4 MR. MOUGEY: Thank you, Your Honor.

5 Good morning, Dr. McCann. Your Honor.

6 THE COURT: Good morning.

7 THE WITNESS: Good morning.

8 **REDIRECT EXAMINATION**

9 **BY MR. MOUGEY:**

10 **Q.** Dr. McCann, let's talk about the scope of what you were
11 asked to do for Your Honor with processing and summarizing
12 the data. Dr. McCann, were you asked to perform an analysis
13 of the adequacy of the due diligence from each of these
14 defendants into these pharmacies?

15 **A.** No.

16 **Q.** Were you asked to review the due diligence documents
17 and I think what was just referred to as just an
18 extraordinary amount of due diligence and apply that to the
19 specific pharmacies?

20 **A.** No.

21 **Q.** Dr. McCann, were you asked to identify whether specific
22 doctors in West Virginia were arrested or stripped of their
23 medical licenses in relation to their prescriptions of
24 opiates?

25 **A.** No.

1 **Q.** Same question, Your Honor (sic) -- same question, Dr.
2 McCann. Were you asked to analyze specific pharmacies and
3 whether or not they were investigated and shut down by
4 local, state or federal regulators?

5 **A.** No.

6 **Q.** Dr. McCann, were you asked to review whether or not
7 each or any of these defendants, AmerisourceBergen, McKesson
8 or Cardinal, had notice of issues relating to specific
9 pharmacies and the volume of shipments into those pharmacies
10 of opiates; specifically, oxycodone and hydrocodone?

11 **A.** No.

12 **Q.** Dr. McCann, were you asked to analyze the
13 responsibilities of each of these pharmacies under the
14 Controlled Substance Act; most specifically, 130174 orders
15 of size, due diligence -- I'm sorry -- size, frequency or
16 pattern and compare that to the due diligence in each of
17 these defendants' files?

18 MR. MAHADY: Your Honor, I think this is outside
19 the scope of the cross examination.

20 THE COURT: Well, I'm going to overrule it and let
21 him answer. It may -- it -- it's close, but go ahead.

22 BY MR. MOUGEY:

23 **Q.** Dr. McCann, were you asked to analyze whether any of
24 these defendants had notice of whether or not residents of
25 Cabell County, or any county for that matter, were traveling

1 distances to fill opiate prescriptions?

2 **A.** No.

3 **Q.** Dr. McCann, were you asked to perform any analysis
4 whether or not any of these defendants had notice that West
5 Virginia, most -- more specifically, Cabell County
6 residents, were traveling from West Virginia to places as
7 far away as Florida to fill prescriptions, opiate
8 prescriptions?

9 **A.** No.

10 MR. MOUGEY: If we could please publish
11 Plaintiffs' Exhibit 24013.

12 May I approach, Your Honor?

13 THE COURT: Yes.

14 THE WITNESS: Thank you.

15 BY MR. MOUGEY:

16 **Q.** Dr. McCann, Plaintiffs' Exhibit 24013 is a list of each
17 of the counties in West Virginia and you were asked a series
18 of questions, I believe, by each defendant about residents
19 from counties surrounding Cabell into -- to fill
20 prescriptions in Cabell County, correct, sir?

21 THE COURT: Mr. Schmidt?

22 MR. SCHMIDT: Your Honor, we'll object to this as
23 outside the scope. I don't see how a new document listing a
24 new ranking that we were given last night of different
25 counties is inside the scope of any cross examination.

1 THE COURT: Where are you going with this, Mr.
2 Mougey?

3 MR. MOUGEY: Pretty easy, Your Honor. First of
4 all, on notice issue, this was provided back in 20 -- either
5 '19 or '20. Had this for at least a year or two.

6 Secondly, Your Honor, as far as where I'm going, we've
7 heard from each of the defendants that the surrounding
8 counties' residents are coming to Cabell to fill opiate
9 prescriptions and what I simply wanted to do, Your Honor, is
10 point out the dosage units and the pills per cap in those
11 surrounding counties that the defendants claim were coming
12 to Cabell to fill prescriptions. Six or seven -- let's see.
13 I think it's a total of one, two, three, four, five counties
14 that are attached or connect to Cabell and then the counties
15 that are within one county of Cabell.

16 MR. MAHADY: Your Honor, I have the additional
17 objection that the witness has already testified very
18 clearly that he knows nothing about these counties, where
19 they are, what relation they have to Cabell County. And so,
20 to now try and bootstrap this in through Mr. Mougey, I
21 think, is inappropriate.

22 THE COURT: I'm going to sustain the objection.

23 MR. MOUGEY: Your Honor, may I respond just
24 quickly? We've allowed each of these defendants to question
25 extensively Dr. McCann about --

1 THE COURT: Well, I'm going to sustain the
2 objection to this. I think he's basically said he doesn't
3 know the answers to what you're asking to ask him. So, I'll
4 sustain the objection.

5 MR. MOUGEY: Your Honor, just -- just hear me out.
6 Your Honor, you can take judicial notice of where these
7 counties are. I want to point out the counties surrounding
8 Cabell. That's it, Your Honor. They've made extensive --

9 THE COURT: Objection's sustained.

10 BY MR. MOUGEY:

11 **Q.** Dr. McCann, in preparation for your testimony today,
12 did you -- did you create an extensive packet on each of the
13 pharmacies that you've covered?

14 **A.** Yes.

15 **Q.** What I've put in front of you, Dr. McCann, is
16 Plaintiffs' Exhibit 44759-A and I'm not going to walk you
17 through this entirely, but what I'd like you to do is flip
18 through Plaintiffs' Exhibit 44759 and explain how these
19 packages were created and, most specifically, did your
20 office create computer code to generate a series of charts
21 and graphs that you've included in these packages?

22 **A.** Yes. This is a set of standard charts and tables for
23 each pharmacy. We create a package like this literally for
24 every pharmacy in the country. A lot of what you and I
25 spoke about on Monday and yesterday morning were a few

excerpted pages from this basic document, which is larger, and includes more information for each of the pharmacies.

Q. So, when -- earlier in the week when we were referring to pharmacy reports or pharmacy packages, you had created a package similar to this for almost every pharmacy that we've discussed this week, correct?

A. Correct.

Q. And Mr. Schmidt asked you questions about pulling out specific documents to get -- to provide to Your Honor, correct?

A. Yes.

Q. What you prepared, however, was a series of charts and graphs on each of the distributors for each of the pharmacies, correct?

A. Yes. Each of these packages are 40 or 50 pages and I think, given time and space constraints, only three or four pages were presented.

Q. And, Dr. McCann, if you would please turn to Page 20 --
I'm sorry. Wrong page. Page 3. I apologize. Is Page 3
one of the -- is an example of the type of chart that is in
every single one of these pharmacy packets that we narrowed
down at the request of the defendants?

MR. SCHMIDT: I'll object to that characterization, Your Honor. We didn't ask them to selectively pick out pages to show the Court from their

1 exhibit. We asked them to narrow the volume of their
2 overall demonstratives.

3 MR. MOUGEY: That wasn't my question, Your Honor.
4 I asked if we were requested to narrow it down.

5 MR. SCHMIDT: I think that's an unfair
6 construction for the witness about discussions that the
7 witness wouldn't know about between counsel and us.

8 THE COURT: I'm going to allow him to answer it.
9 Go ahead if you can answer it, Dr. McCann. Go ahead.

10 THE WITNESS: I'm sorry. Could you ask it again,
11 please, Mr. Mougey?

12 BY MR. MOUGEY:

13 **Q.** Yes, sir. Page 2 that's in front of you, did -- is
14 this sample that identifies each and every distributor that
15 sent shipments into Sav-Rite, was that a standard page in
16 each of your pharmacy packets?

17 **A.** Yes. Every single package shows every single
18 distributor of oxycodone and hydrocodone each year to each
19 pharmacy.

20 **Q.** So, for example, the McKesson shipment in 2006 to
21 Sav-Rite of hydrocodone of 2.2 million pills is identified
22 in each of these packets?

23 **A.** Or the analogous number, yes, that's correct.

24 **Q.** And also, Miami-Lukens of 342,000 pills in 2006, that
25 type of chart and graph is in each one of these so Your

1 Honor could look and see which of the distributors supplied
2 each and every one of the defendants -- yes, each around
3 everyone of the pharmacies?

4 **A.** Correct.

5 **Q.** Dr. McCann, just looking quickly at 2007, McKesson,
6 2.6 million dosage units of hydrocodone in 2007, correct?

7 **A.** Correct.

8 **Q.** So, in two successive years, 2.2 million and
9 2.6 million from McKesson into Sav-Rite pharmacy in Kermit,
10 West Virginia, correct?

11 **A.** Correct.

12 **Q.** Total of 4.8 million dosage units into Kermit, correct,
13 sir?

14 **A.** Correct.

15 **Q.** And, Dr. McCann, proceeding quickly so Your Honor can
16 get a feel for what's in each of these pharmacy packets,
17 please turn to Page 9. Each one of these pharmacy packets
18 identifies the distribution from McKesson and others,
19 correct, sir?

20 **A.** Correct.

21 **Q.** And if you turn to Page 14 --

22 **A.** Yes.

23 **Q.** Each and every one of these pharmacy packets contains a
24 table showing the monthly distribution to those pharmacies
25 and the monthly changes, correct, sir?

1 **A.** Correct.

2 THE COURT: And you did a packet for each one of
3 the pharmacies that was selected for you by counsel for the
4 plaintiffs; is that right?

5 THE WITNESS: More broadly than that, a packet for
6 every pharmacy, I think, literally in the country. There's
7 -- there's hundreds of thousands of these. And so, that
8 includes every pharmacy in West Virginia and every pharmacy
9 that's selected for that exhibit that we looked at.

10 THE COURT: Well, you didn't do a packet for every
11 pharmacy in America, did you?

12 THE WITNESS: We did.

13 THE COURT: You did?

14 THE WITNESS: We did.

15 MR. MOUGEY: Yes, sir. We're going to get into
16 that.

17 BY MR. MOUGEY:

18 **Q.** So, Dr. McCann, each --

19 MS. SALGADO: Your Honor, just to note, I don't
20 believe that those pharmacy packets have been provided in
21 this case for every pharmacy in the country; is that right?

22 BY MR. MOUGEY:

23 **Q.** Dr. McCann, where are these pharmacy charts and reports
24 that contain a -- most or a lot of information that are in
25 these packets? Where can anyone find those?

1 **A.** They're on my website, Your Honor.

2 **Q.** And how long have they been on your website?

3 **A.** Over a year.

4 **Q.** They don't contain all of the information in these
5 packets, but they contain charts and reports on each
6 pharmacy?

7 THE COURT: Just a minute.

8 MS. SALGADO: Right. I just was noting that --
9 the characterization that there are these packets provided
10 for every pharmacy in America. I don't believe that we have
11 had access to those; is that correct?

12 BY MR. MOUGEY:

13 **Q.** Dr. McCann, who can --

14 MR. SCHMIDT: Your Honor, can I make a separate --
15 or if you're rephrasing, then that moots my objection.

16 THE COURT: Go ahead.

17 MR. SCHMIDT: I was just going to say, I haven't
18 been objecting to the leading that's been going on for the
19 past five minutes, but I think we're now getting testimony,
20 so I will object.

21 THE COURT: Don't lead him, Mr. Mougey.

22 MR. MOUGEY: Yes, sir.

23 BY MR. MOUGEY:

24 **Q.** Dr. McCann, the pharmacy reports that are on your
25 website, how can anyone access those?

1 **A.** Well, on my firm's website, there's a tab for opioid
2 data. It was put up there to make the raw and processed
3 ARCOS data available and to make reports available on every
4 -- every state, every county, every pharmacy, and the only
5 -- I think the main difference between those reports and
6 these reports is that the reports that are on our website
7 have to be based solely on the ARCOS data, the 2006 to 2014
8 time period, where the data has been publicly -- made
9 publicly available by Judge Polster. These exhibits that
10 we're looking at, these pharmacy reports, include the
11 defendant transaction data before and after, but other than
12 that, I think they're the same.

13 **Q.** Dr. McCann, I hand you what we've marked as Plaintiffs'
14 Exhibit 44758. Dr. McCann, this is a SafeScript Report. Is
15 this laid out similar to the exhibit that we just went
16 through?

17 **A.** Yes.

18 **Q.** And does this report contain charts and graphs
19 identifying each and every distribution to each of the
20 pharmacies? I mean to SafeScript pharmacy?

21 THE COURT: Mr. Mahady?

22 MR. MAHADY: Your Honor, I don't understand the
23 point of this. The plaintiffs have spent plenty of time
24 going through the charts they selected to use for SafeScript
25 Pharmacy. We're now on redirect and they're trying to use a

1 much broader set. I simply don't understand the purpose.
2 It just seems cumulative and unnecessary at this point.

3 MR. MOUGEY: I'll explain the purpose.

4 THE COURT: Okay, please.

5 MR. MOUGEY: Your Honor, Mr. Schmidt spent about
6 45 minutes questioning the witness that the charts were
7 cherry-picked and selected. What we're trying to
8 demonstrate, Your Honor, just to give you two examples,
9 that's all I'm trying to go through of what these pharmacy
10 packets looked like and what we tried to introduce over Mr.
11 Mahady's objection and Mr. Schmidt's objection.

12 I just wanted you to get -- see two packets so you
13 could see what we put together, Your Honor. That's it.

14 And, Your Honor, one of the issues that concerns me
15 going forward is exactly what happened yesterday with Mr.
16 Schmidt. The questioning of Dr. McCann, you didn't include
17 this, you didn't include this, and you didn't include this.

18 And, Your Honor, you got a preview of -- I -- the very
19 first day I appeared in front of you, Your Honor, I
20 predicted that this was going to be a problem, is that we
21 wanted to put these pharmacy packets in as tools for the
22 Court to use and the parties to use to know exactly what was
23 distributed.

24 The defendants spent a significant amount of time over
25 the last two days arguing about what wasn't included when,

1 in fact, Judge, we tried to include it and we tried to
2 include extensive tools. I just wanted you to see what was
3 available so, going forward to today, we have a pharmacy
4 packet for 25 different pharmacies in CT2 if the Court needs
5 them. That's all I'm trying to do, Judge, is show you what
6 we have and what we've created. That's it.

7 MR. MAHADY: Your Honor --

8 THE COURT: Yeah, but you've picked -- you've
9 selectively picked pharmacies for him to use. I mean, I
10 don't understand your point.

11 MR. MOUGEY: Well, my -- I'm sorry, Judge. I must
12 be doing a terrible job of explaining it.

13 THE COURT: Well, I may not --

14 MR. MOUGEY: If I may take another crack at it and
15 I appreciate your patience, just so we understand.

16 The CC2 packets, the Cabell County packets, Your Honor,
17 are approximately 20, 25 pharmacies from Cabell County. All
18 right. We've shown each one of those. Each one of these
19 packets contain a list and they contain detailed information
20 about where the pills came from, from any and every
21 distributor.

22 What I was worried about not getting these in is
23 exactly what happened with Mr. Schmidt's questioning of Dr.
24 McCann of what we didn't put in. So, on one hand, the
25 defendants are objecting to the volume of us trying to put a

1 complete record in and then -- and which you agreed, told me
2 to narrow down. And then, on the other hand, another
3 defendant's questioning about why things weren't included.

4 And all I'm simply trying to point out, Your Honor, is
5 we tried to include them and we tried to include and
6 identify every single distributor distribution to every
7 pharmacy, especially for the Cabell County pharmacies.

8 That's it, Your Honor.

9 THE COURT: Well, if I remember correctly, you
10 tried to put in the entire universe of the ARCOS data, which
11 is unintelligible, until Dr. McCann used his computer magic
12 on it.

13 MR. MOUGEY: Yes, sir.

14 THE COURT: And pulled out the parts that were --
15 that we needed.

16 MR. MOUGEY: Yes, sir. And that's exactly right.
17 And you put it perfectly.

18 So, we had the ARCOS data in total, which the
19 defendants objected, and you -- and you pointed out, Judge,
20 it was cumulative. And then, we attempted to put in these
21 packets for the pharmacies in Cabell County and the
22 defendants objected that they were voluminous.

23 So, all I'm trying to point out, Your Honor, is these
24 tools are available to the Court because what I am worried
25 about is that when Dr. McCann leaves the stand, that the

1 type of questioning that Mr. Schmidt did yesterday about
2 what we didn't include is right in these packets sitting in
3 the jury room for every pharmacy, but they've objected to
4 volume.

5 The tools are available. We've identified detailed
6 information in these packages, Your Honor. That's all I'm
7 trying to demonstrate.

8 MR. MAHADY: Your Honor, if I may, this Court has
9 to consider evidence, not tools hand-picked by the
10 plaintiffs' lawyers. And I know we are going to address
11 this issue of what constitutes a 1006 summary, but we
12 continue to maintain that these are not 1006. They are not
13 evidence.

14 So, while it may help facilitate the plaintiffs' case
15 here to give the Court essentially an expert's work product,
16 it's not evidence and, if they haven't established that, the
17 Court should not consider it. And we can address that at
18 the appropriate time, but we strongly object to the use of
19 tools to help the Court as we go forward.

20 THE COURT: Okay. Mr. Schmidt, do you want to say
21 something?

22 MR. SCHMIDT: Yes, briefly, just to respond to Mr.
23 Mougey's comments, which are not at all what I was trying to
24 communicate with my cross examination.

25 With the Strosnider Sav-Rite pharmacy, there was a

1 three-page document that was shown to Dr. McCann. They read
2 global numbers without ever making clear that most of those
3 numbers did not apply to McKesson. They then only showed
4 data that applied to McKesson.

5 We did not ask them to cull out of this document that
6 they showed the court direct examination data regarding
7 other distributors. When I showed Dr. McCann the data he
8 had provided regarding other distributors, I did my level
9 best to make it clear that we had been provided with that
10 data. We didn't make that data up, but it came from Dr.
11 McCann from this very packet that Mr. Mougey is now trying
12 to introduce into evidence.

13 So, the point of the cross examination was not to
14 suggest that he had not done these broader analyses. The
15 point of the cross examination was that, in the direct
16 presentation, the culling down of those analyses to three
17 pages that make no express mention of the other
18 distributors, but that included reading their numbers into
19 the record, that we needed to make a complete record on
20 that.

21 MR. MOUGEY: Your Honor, that's -- that's not
22 accurate.

23 THE COURT: Well, I'm going to sustain the
24 objection, Mr. Mougey, and you can move on.

25 MR. MOUGEY: Your Honor, we move to admit each of

1 the pharmacy packets that we have tried to admit now three
2 different times that we've been -- we've been, by the
3 objections of the defendants, have been told to narrow those
4 down to a handful of pages. Mr. Mahady just -- just argued
5 to the Court that those -- these are tools, not evidence.

6 Your Honor, we move every single one of these packets
7 to the place where we started and the Court can make -- even
8 conditionally, Your Honor, the Court can make decisions
9 moving forward about what evidence is in and not in, but it
10 does give the Court the flexibility to reference these so we
11 do not have to have discussions like we're having right now
12 with Mr. Schmidt about what was in and what wasn't because,
13 Your Honor, I do believe I showed a chart immediately
14 thereafter that identified the specific McKesson shipments.

15 And this is all unnecessary, Your Honor. This is
16 classic 1006 summary evidence, classic, that the -- that the
17 underlying database is so voluminous and is impractical to
18 use. Therefore, we've turned it into charts and packets and
19 summaries for the Court to use, which is exactly what 1006
20 is designed to do.

21 So, I believe, Your Honor, what I think would be a
22 smart approach to this, is Mr. Mahady suggested this just a
23 few days ago, is that -- it seems like two weeks ago --
24 which would be for each of the parties to submit some briefs
25 based on where we are and you allow the defendants to cross.

1 Let's get this put in an organized fashion for Your Honor
2 with the -- with some short briefings for you to be able to
3 review and make a decision about whether or not this is
4 appropriate 1006 because we believe it squarely falls, is
5 exactly what 1006 is designed to do. Otherwise, Your Honor,
6 how in the world are we going to get the database in as you
7 just said?

8 MR. MAHADY: Your Honor, I would like to respond
9 on 1006. I think we're probably at the appropriate time to
10 do so. Do you mind if I go to the podium and address it --

11 MR. MOUGEY: No. I --

12 MR. MAHADY: -- or do you want to hold off on this?

13 THE COURT: I think -- let me get one other oar in
14 the water here.

15 MS. SALGADO: No. I'll let Mr. Mahady go first,
16 but I appreciate it, Your Honor.

17 MR. MAHADY: Your Honor, to address one point if
18 we're not going to argue this right now, we do not think
19 that these should be conditionally admitted and, while we
20 are happy to brief the issue, we do not think until that
21 briefing has been submitted and decided that these 1006
22 summaries, purported evidence, should be used with witnesses
23 on cross examination. So --

24 MR. MOUGEY: Exactly my point, Your Honor.

25 Chicken -- chicken or the egg, which we've been trying to

1 get these admitted for three months and get this issue
2 framed up for Your Honor.

3 THE COURT: I -- I want this issue briefed whether
4 this is appropriate 1006 and whether it comes in as evidence
5 or whether it's just demonstrative under 1006. I think you
6 ought to brief it and let me consider it further on paper
7 because I think it's a crucial issue in the case and I need
8 all the help on the law I can get. So --

9 MR. MOUGEY: That -- that sounds perfect, Your
10 Honor, and I think we just need to figure out what the
11 timetable is so we can get it in front of Your Honor and I
12 think Mr. Mahady --

13 THE COURT: Okay. How much time do you need?

14 MR. MAHADY: Today is Wednesday, Your Honor. We
15 need to have the transcripts, obviously, which I believe we
16 do. We -- I -- I'm not writing the briefs, so I've got to
17 be careful here I don't get in trouble back at the ranch.

18 MR. MOUGEY: I think I heard Mr. Mahady say end of
19 the day, he was ready.

20 MR. MAHADY: If you'd want to call ABC witnesses,
21 I'd commit to that. But why don't we say end of the day
22 Friday?

23 THE COURT: Well, that's okay with me.

24 MR. MOUGEY: I'm okay with that, but you heard Mr.
25 Mahady say that they're going to object. So, when Mr.

1 Farrell is going to try to use the numbers that we've just
2 put in with the next series of witnesses from ABC, that
3 you're going to hear an objection that they're not admitted,
4 Your Honor. So, that's kind of what I meant.

5 The -- I think I said the chicken before the cart,
6 but I think I mixed my examples there. The horse before the
7 cart.

8 MR. MAHADY: Your Honor --

9 THE COURT: Go ahead.

10 MR. MAHADY: I'm sorry. Go ahead, Your Honor.

11 THE COURT: I can hear the testimony and then
12 decide later. We don't have to --

13 MR. MOUGEY: Exactly.

14 THE COURT: -- worry about confusing a jury. We
15 only have to worry about confusing me. And so, I think the
16 thing to do is go ahead with the evidence and the testimony
17 and see where it leads and then consider the briefs and I
18 can go back and sort it out after the fact.

19 MR. MOUGEY: That sounds like a plan, Your Honor.

20 MR. MAHADY: Your Honor, appreciating Your Honor's
21 guidance there, the one thing we would request is that they
22 cannot show the witness, an AmerisourceBergen witness or a
23 Cardinal, a McKesson witness, a chart that they didn't use
24 with Dr. McCann.

25 What Mr. Mougey is saying is we decided which ones we

1 wanted to show him yesterday when we were questioning, but
2 here's the 50-page packet which has all the background
3 stuff. That has not come in at all.

4 So, to the extent they're going to show our witnesses
5 anything, we think it should be -- it should be absolutely
6 limited to what Dr. McCann has testified to.

7 MR. MOUGEY: Just quickly. What I was trying to
8 demonstrate this morning, Your Honor, is the kind of
9 catch-22 we're in with the objection over volume and then
10 pointing out that there's specific data points that are not
11 in when we've tried to get them in, Your Honor. So, the
12 defendants can't have it both ways with, say, it's too much
13 volume when I've told Your Honor there's 500 million lines
14 and, if you printed it out, there were 27,000 banker's
15 boxes.

16 I've got these pharmacies packets to one -- we're
17 arguing about one banker's box worth of pharmacy packets to
18 get into evidence. All I'm asking, Your Honor, let's get
19 the 1006 briefed. Let's hold this decision because, if the
20 defendants go -- and the witnesses go a different route than
21 the charts that are in, I've said this the other day, Your
22 Honor, my concern was, is that the packets weren't into
23 evidence.

24 So, Judge, I think we don't have to make this decision
25 now. Let's not argue it hypothetically. We have the

1 specific charts that I have into evidence. Let's get this
2 briefed and have Your Honor make a ruling and a decision
3 and, if issues arise, I just -- to steal Mr. Mahady's
4 phrase, I've put a pin in it and let's decide it as it
5 arises because I don't think you need to make this decision
6 right now before the 1006s, Your Honor.

7 All I wanted you to see is the types of packets that I
8 had prepared and that we have -- we tried to get into
9 evidence over their objection. That was it, Your Honor.

10 MR. MAHADY: Your Honor, I think we have a problem
11 here because I think what the plaintiffs are trying to do is
12 saying let's brief it, let's let it, you know, sit out there
13 to the extent it needs to sit out there and, by the time we
14 get a ruling, all of the company witnesses will have already
15 testified and, at that point, it's tough to undo if the
16 Court rules that these 1006 summaries that they call them
17 are not evidence.

18 We can brief this on an accelerated basis. I think
19 I've committed to that. If we have to bump it up a day to
20 tomorrow, we'll have it briefed by tomorrow.

21 But we would like a ruling on this. We are not
22 comfortable with a conditional ruling letting all of this
23 come in with our witnesses and then finding out after the
24 fact that they are, in fact, not evidence. So --

25 MR. MOUGEY: Which is --

1 MR. MAHADY: We certainly defer to Your Honor on
2 his schedule and how he wants to decide these things, but I
3 am concerned that this could be somewhat of a drawn out
4 process in briefing and it's going to be tough to undo.

5 MR. MOUGEY: Your Honor, which is exactly why
6 we've been trying to address this for three months, to avoid
7 taking trial time to go back and forth on this.

8 I agree with Mr. Mahady. We are beyond time to get
9 this decided. And I'll avoid any color of what I believe
10 cross did or didn't reveal at this point but, Your Honor,
11 let's get it briefed, let's get it in.

12 And you made the best point so far out of either of us
13 is, the gatekeeper function of having a jury here is not an
14 issue, and I don't think anybody in this courtroom is
15 concerned with your ability to make decisions and give the
16 weight the -- the evidence the appropriate weight it
17 deserves, but this is exactly why we tried to address this
18 issue prior to trial, and I think what's playing out right
19 now is exactly what we've been saying for what feels like
20 months.

21 MR. MAHADY: Your Honor, if I could just make two
22 more points. This issue has been playing out for months.
23 The reason this issue has been playing out for months was
24 because these purported 1006 summaries are layered with
25 analysis and relevancy decisions made by the plaintiffs and

1 their expert.

2 If these were true 1006 summaries, we wouldn't be
3 fighting about it. We probably would have come into court
4 with some stipulation that they can come in. But this is a
5 problem of the plaintiffs' own making. The fact that they
6 are not able to get these into evidence easily should not be
7 -- it should not be implied that we caused this.

8 The other issue is that Mr. Mougey references that this
9 is a bench trial, and that's absolutely true, and we
10 certainly appreciate that Your Honor can make decisions as
11 to weight and everything.

12 But in addition to being a bench trial, this is the
13 first trial in the federal MDL. Decisions that are made
14 here on these critical issues will have a ripple effect into
15 other trials; not just other federal trials, but other state
16 court trials, including trials where the same plaintiff
17 lawyers and Dr. McCann are a part of it.

18 And so, we are a little concerned about the suggestion
19 that this is just a bench trial. We can be a little more
20 relaxed, to the extent that is what they're suggesting. I'm
21 not saying it is.

22 But this is a critical issue. There's pretty strong
23 case law on this from the Fourth Circuit. And that's why we
24 feel so strongly here. And we're going to brief it and
25 we'll have it to you by the end of the day tomorrow, Your

1 Honor.

2 THE COURT: Can you brief it and have it to me by
3 the end of the day tomorrow, as well?

4 MR. MAJESTRO: Yes, Your Honor

5 MR. MOUGEY: Yes, Your Honor.

6 THE COURT: Okay. Does that get around the
7 problem of calling witnesses without having this resolved,
8 Mr. Mahady?

9 MR. MAHADY: Your Honor, our position is that they
10 should not be using expert demonstratives with our witnesses
11 until the Court has ruled on it.

12 MR. MOUGEY: Your Honor, many of these charts the
13 defendants have had for a year and if they had issues of --

14 THE COURT: Well, okay. I've got that point, that
15 they've had it for a year, and that's beside the point now,
16 as far as I'm concerned.

17 MR. MOUGEY: I agree.

18 MR. MAHADY: Your Honor -- I'm sorry.

19 THE COURT: Yes, sir?

20 MR. NICHOLAS: Well, since I'm -- it's Bob
21 Nicholas. Since I'm going to be handling the first witness
22 that's called for ABDC this afternoon, or later this
23 morning, my suggestion is that the witness -- that
24 plaintiffs not be permitted to show these charts to the
25 witness.

1 They can ask questions, you know, that -- they can ask
2 their questions. I mean, whatever is in the charts that
3 they want to ask, they can just ask the question. I don't
4 think this is the time to start displaying these charts.

5 THE COURT: Well, that's exactly right, isn't it,
6 Mr. Mougey? You can ask the questions; don't show them the
7 chart.

8 MR. MAHADY: And, Your Honor, I will note that's
9 the same thing that we were held to yesterday with the
10 expert report.

11 THE COURT: Right.

12 Mr. Farrell?

13 MR. FARRELL: The first witness we intend to call
14 is the Senior Vice President of Corporate Security and
15 Regulatory Affairs, Chris Zimmerman. It has been our
16 intention for three, four years now to be able to take the
17 amount of pills that were sold by his company under his
18 watch to SafeScript and ask him how is it possible this
19 occurred if you were maintaining effectively --

20 THE COURT: Well, you don't need the exhibit to
21 ask him that, Mr. Farrell.

22 MR. FARRELL: So, what we've done is we've taken
23 the data and we've asked you to admit the raw data and you
24 said it was cumulative. What we have done after that is we
25 have attempted to take that data and put it into components

1 and the defendants have objected and you've yet to rule.

2 The reason it's important is this, is that in certain
3 months, you will see that -- I'll give you an example. In
4 July of 2007, with SafeScript, an event happened. Then, the
5 month after that, they sold more pills. The month after
6 that, they sold less pills. The months after that, they
7 sold three times the pills.

8 One of the metrics required we argue under law is to
9 look in change of patterns. This packet, P-44758, doesn't
10 contain the 40,000 lines of individual transactions. It
11 summarizes it into months, into compartments.

12 As you were asking Mr. -- Dr. McCann earlier, we can
13 literally pull up on the screen, and we will today, if need
14 be, the actual transactions in a spreadsheet, 40,000 of
15 them, and be able to scroll through them to ask this witness
16 what happened between Point A and Point B.

17 So, it's one or the other. We're either going to need
18 to go through the transaction data line by line by line to
19 illustrate a systemic and nationwide failure to maintain
20 effective control or we can put in the packets that convert
21 the Excel spreadsheet into charts. We're asking you for one
22 or the other. We have both.

23 And, importantly, Judge, respectfully, Dr. McCann has
24 laid the foundation for this to be admitted into the record
25 not as anything else other than actual evidence. He's laid

1 the foundation. Authenticity is stipulated. He's testified
2 that -- now you can apply weight to it as you deem fit, but
3 it is evidence of what they did, when they did it, and where
4 they did it.

5 MR. MAHADY: Your Honor, if I may respond. I
6 think yesterday actually illustrated the concern with just
7 showing a witness a chart. We saw on McCloud Family
8 Pharmacy that the chart that the plaintiffs prepared for one
9 month where there was a large spike overstated our
10 distribution by, as Mr. McCann testified, 20-some percent.

11 If that chart was shown to one of our witnesses, they
12 would have no idea that those 15,200 pills actually were
13 returned to AmerisourceBergen, were never on the shelves for
14 the pharmacy, and that's the concern.

15 Now, instead, if the plaintiffs showed them the
16 transactional data, Mr. Zimmerman would look at it and he
17 would say, okay, what I see here are five separate
18 transactions showing negative numbers, which shows that it's
19 not the 57,000 number you're telling me. It's actually 42.

20 So, it gets at the inherent problem with the charts.
21 The charts are based off of relevancy determinations made by
22 the plaintiffs. It does not accurately reflect what our
23 actual distribution was. So, that's the problem we have
24 with just showing them charts.

25 MR. MOUGEY: Your Honor, when Mr. Mahady yesterday

1 brought up the 15,200, I typed that into my calculator using
2 -- turning it into a percentage. It's .000003 of the pills,
3 and I might have a couple 0s missing, into McCloud Pharmacy,
4 Your Honor.

5 So, one issue, as far as the reliability, Dr. McCann
6 has testified that 99.9% of the transactions match. They've
7 done nothing to undermine that reliability with that
8 example, number -- number one.

9 Number two, there has been no relevancy decisions about
10 tracking these shipments into pharmacy by pharmacy. The
11 retail and chain pharmacies have been identified for Your
12 Honor. The hospitals have been removed. And the shipments
13 per distributor are included. We've put all of that into
14 the record.

15 And there are additional -- as I have just shown with
16 the SafeScript chart, there's no relevancy determination
17 and, after hearing all of this cross that they've asked for
18 over the last day, you've heard nothing besides weight, Your
19 Honor.

20 THE COURT: Well, let me -- let me try to cut to
21 the chase here. The issue is whether the documentation here
22 is admissible into evidence as the summary chart of -- under
23 -- I can't remember the rule, but as a summary chart. The
24 information has been shown to the witness and so, it's -- in
25 its current form, it's a demonstrative that hasn't been

1 admitted into evidence, but it is a piece of paper that has
2 illustrated his testimony as a demonstrative. So, it's
3 already before the Court.

4 The issue is whether I'm going to admit it as evidence
5 or leave it in its current form as a demonstrative, which
6 will assist the trier of fact and it will not be admitted
7 into evidence. Since it's already been displayed as a
8 demonstrative, why can't the plaintiffs use it to testify --
9 to -- to question the witness even if it's not admissible?

10 MR. MAHADY: One -- go ahead.

11 MR. NICHOLAS: Well, I think the answer is because
12 the witness doesn't have the benefit -- the witness is
13 seeing the chart for the first time. The witness will not
14 have the benefit of the challenges that have been made to
15 its accuracy and the limitations that, you know, could
16 result in the witness answering a question about the
17 document that assumes things that don't turn out to be
18 correct and the witness will have no way of knowing that.

19 I don't -- I'm having trouble understanding why -- this
20 all sounds very complicated, but it seems to me that if Mr.
21 Farrell, who I assume is going to question the next witness,
22 I don't know why he can't formulate a question that gets at
23 whatever information he wants to try to elicit to see if the
24 witness knows about without the benefit of the piece of
25 paper.

1 THE COURT: Yeah. What about that, Mr. Farrell?

2 MR. FARRELL: Great point. So, when -- if I may?

3 When I stand up to ask Mr. Zimmerman, please turn to Page --
4 to Page 16 and look at this, they're going to stand up and
5 say Page 16 isn't in the record.

6 When I stand up and say please go to Line 43,728 and
7 explain why you shipped 50,000 pills on August 2nd, they're
8 going to object and say it's not in the record.

9 It's the chicken or the egg. This is the box that we
10 are being placed in.

11 MR. NICHOLAS: I feel like -- I'm sorry. I feel
12 like we're --

13 THE COURT: Well, you're suggesting that he can --
14 he can ask the question without the use of the paper, right?

15 MR. NICHOLAS: Yes.

16 MR. FARRELL: So, I can go through each of the
17 transactions from the dataset that you have not allowed to
18 be entered into the record, I can pull up this, read it to
19 him, and ask him if he can confirm it, and he's going to say
20 yes or no? I mean, he's going to say I haven't seen the
21 data.

22 MR. NICHOLAS: Well, I don't know what he'll say
23 about the particular data that he's going to be shown. He
24 may well say I haven't seen this or I haven't seen that.

25 But one other point is that we have produced

1 transactional data in this case. If they want to use what
2 we've produced, that's a different story. It seems to me
3 they can show him that.

4 What we're talking about now is something different.
5 It's something created by an expert that he has not -- he
6 doesn't know anything about. He hasn't read their reports.
7 He has -- you know, he hasn't seen whatever he is going to
8 be shown before.

9 He's going to be given a cold -- you know, what we
10 would argue is pejorative, or biased possibly, or unreliable
11 summary that -- that's based on things, you know, decisions
12 that were made by counsel. We've already heard that counsel
13 was cherry-picking -- I'll withdraw the word.

14 THE COURT: Okay. Okay. Here's what I'm going to
15 do. I'm going to pull the plug on this. I need advice of
16 counsel, so I need to confer with my law clerks.

17 I have another matter to take up at noon. Let's come
18 back. Let's pull the plug on it now and come back at 1:30
19 and we'll see where we are, okay?

20 MR. HESTER: And, Your Honor, should we be aiming
21 to submit briefs by tomorrow on this issue?

22 THE COURT: Yes. I want the issue briefed. I
23 would like to have the issue briefed.

24 MR. MAHADY: Thank you, Your Honor.

25 MR. NICHOLAS: Thank you, Your Honor.

1 (Recess taken)

2 THE COURT: Dr. McCann? Dr. McCann?

3 MR. MOUGEY: He's outside, Judge. We'll get him.

4 Sorry. I wasn't sure.

5 THE COURT: We might be a little early here.

6 All right. Mr. Mougey, you may proceed.

7 MR. MOUGEY: Thank you, Your Honor.

8 BY MR. MOUGEY:

9 **Q.** Dr. McCann, before the lunch break, you had responded
10 to a question from the Court about the scale or how large of
11 the summary charts and graphs and market share you've
12 produced around the country.

13 **A.** Yes.

14 **Q.** Would you please explain to the Court how you were able
15 to create those charts and graphs for every county in the
16 country?

17 **A.** Sure. So, once the data was defined to be -- for the
18 charts and tables that we've been talking about these three
19 days to be shipments from manufacturers to distributors and
20 then shipments from manufacturers and distributors to
21 dispensers --

22 THE COURT: Mr. Mougey, I didn't mean to open
23 another line of questioning.

24 MR. MOUGEY: It was actually in response to Mr.
25 Schmidt and I promise it will be just a second, Judge.

1 THE WITNESS: Once that data was prepared, sub-set
2 it and prepared, it was a fairly simple matter of developing
3 a template for each of these figures and tables and then
4 writing software code. I say a relatively simple matter,
5 but to run the code to produce all of these reports for
6 every pharmacy in the country literally takes a few days of
7 computer time on several fast computers to run, but once
8 it's programmed, it creates the same report for every --
9 every pharmacy.

10 **Q.** Mr. Schmidt asked you about the scale of a couple of
11 particular charts. Are there individuals in your office
12 that sit and create chart by chart by chart subjectively
13 changing the scale on each chart?

14 **A.** No. All of that is programmed and it's programmed just
15 as we saw on those couple of examples so that the vertical
16 scale just exceeds the highest bar on the chart. That's the
17 way the program is written and I think the right way to
18 reflect the data.

19 **Q.** Dr. McCann, you were asked yesterday about your
20 compensation for the work in this case. Would you please
21 explain to the Court the number of different bellwethers
22 you've worked on for the MDL or the Executive Committee?

23 **A.** Well, initially, there was a lot of work done just
24 generally for the MDL. The first year or year and a half's
25 worth of work, I think, was sort of general purpose work.

1 And then, I've done work specifically on what we've been
2 referring to as CT21, CT2 and CT23. Some of that work,
3 significantly in addition to the sort of common development
4 that was done on -- during the initial year.

5 **Q.** Let me just -- instead of the acronyms, let's, if you
6 would, help the Court with the counties. We have Cabell
7 County. You list them off for the Court.

8 **A.** So, Cabell County and the City of Huntington here.
9 Initially, it was Cuyahoga and Summit County. And then,
10 more recently, I filed an expert report and will give a
11 deposition in Lakewood in Trumbull County.

12 **Q.** San Francisco?

13 **A.** San Francisco.

14 **Q.** Have you also done work on the New York case on behalf
15 of the MDL even though that's a state court case?

16 **A.** Yes. I filed an expert report, gave a deposition, and
17 testified during a Frye hearing.

18 **Q.** Are there active Attorney General cases that you're
19 working on around the country, as well?

20 **A.** Yes. There's somewhere between eight and twelve. I'm
21 not just sure exactly how many, but quite a large number,
22 and then some other sort of work that doesn't fall into
23 either of those two categories.

24 **Q.** Dr. McCann, Mr. Mahady yesterday asked you about a
25 Texas federal court opinion and asked you to read a couple

1 of sections off the lower court opinion, correct, sir?

2 **A.** Right. Not the -- not the opinion on the motion to
3 vacate, but an opinion denying my motion to intervene.

4 **Q.** And, Dr. McCann, so the Court understands the whole
5 story --

6 MR. MOUGEY: May I approach, Your Honor?

7 THE COURT: Yes.

8 BY MR. MOUGEY:

9 **Q.** And the entire picture, I've handed you, sir, the Fifth
10 Circuit opinion. Dr. McCann, just to cover this briefly, if
11 you would, sir, turn to Westlaw Page 2.

12 **A.** Yes.

13 **Q.** And the sentence three quarters of the way down the
14 paragraph on the right -- left-hand side that begins with
15 "The District Court vacated", would you please read that
16 sentence into court? Actually, the next two sentences?

17 **A.** "The District Court vacated the award and granted
18 Morgan Keegan attorneys' fees and expenses. The Court based
19 its decision on a finding that either the award was procured
20 by fraud or, alternatively, that the arbitration panel
21 exceeded its powers. Because we conclude that these
22 holdings were in error, we reverse and remand with the --
23 with instructions to enter judgment enforcing the
24 arbitration award."

25 **Q.** Dr. McCann, would you please turn to Page 4 and read

1 the last sentence of the Fifth Circuit's reversal under the
2 underlying court that begins with, "Thus, even"?

3 **A.** "Thus, even if the evidence supported a finding of
4 fraud, which it does not, this prong is unsatisfied. We
5 conclude that the District Court erred in vacating the
6 arbitration award on fraud grounds and expressly vacate the
7 finding that Dr. McCann committed fraud."

8 Q. Dr. McCann, would you please turn to Page 6 and read
9 Footnote 4 into the record?

16 Q. All right. Dr. McCann, I would like to go full circle
17 to where we started on Exhibit 44711, Page 17.

18 A. Yes.

19 MR. MOUGHEY: Bear with me, Your Honor.

20 BY MR. MOUGEY:

21 Q. Dr. McCann, these were the markings that I made on the
22 board yesterday as we were going through Page 17 and I want
23 to just conclude with just a couple of questions from these
24 charts.

25 This top conclusory row that I have circled with 63

1 dosage units per cap from The Big Three, 37 from West
2 Virginia and 17.08, are those from simply retail and chain
3 pharmacies?

4 **A.** Yes.

5 **Q.** And, Dr. McCann, are these the NPI definition of retail
6 and chain pharmacies or the NPI definition of retail and
7 chain pharmacies?

8 **A.** These are the DEA/ARCOS definition.

9 **Q.** And Mr. Schmidt asked you several questions about your
10 testimony that had left off the VA and -- from McKesson's
11 numbers, correct, sir?

12 **A.** Correct.

13 **Q.** And as we evidenced on Page 17, sir, what were the
14 numbers that were focused on when reviewing Page 17 of
15 Exhibit 44711?

16 **A.** The retail and chain pharmacies, the VA is listed
17 there, but my focus and your notations are on the retail and
18 chain pharmacies, and we -- we did not count the VA clinic
19 shipments against McKesson in this calculation.

20 **Q.** And, Dr. McCann, on Page 18 of the same exhibit with
21 all three of the defendants, does the following slide
22 include the VA?

23 **A.** No, it does not.

24 **Q.** And, Dr. McCann, did you use the NPI definition of
25 retail and chain pharmacies in -- on Page 18?

1 **A.** Yes. That is the way we've been saying it. Perhaps a
2 slightly different way of saying it is we used the NPI
3 Dictionary to identify what we thought were closed-door
4 facilities and I articulate in the report the six or seven
5 categories under the NPI Dictionary that would be
6 closed-door pharmacies. And so, we take those out of the
7 retail and chain pharmacies identified by ARCOS to create
8 this exhibit.

9 **Q.** And we've covered a lot of summary data the last two
10 and a half days, Dr. McCann. Just 30,000-foot-view, what
11 impact does using the NPI definition of retail and chain
12 have on the number of dosage units that came into Cabell
13 County?

14 **A.** Well, it reduces the number a little bit because it
15 doesn't include extended care facilities and other what
16 we've called closed-door facilities.

17 **Q.** Can we move back one page, please? So, Dr. McCann, the
18 57.09 dosage unit number excludes chain -- I'm sorry --
19 excludes closed-door and mail order pharmacies, correct?

20 **A.** That's correct.

21 **Q.** Would you consider then the NPI definition more
22 conservative or more aggressive when calculating the number
23 of dosage units into Cabell County through retail and chain
24 pharmacies?

25 **A.** Well, it's more conservative. First, we excluded, of

1 course, the VA clinic and all other hospitals and clinics,
2 but then we further exclude any extended care facilities.
3 So, the numbers across the board are about ten percent lower
4 when you exclude those extended care facilities and similar
5 closed-door pharmacies.

6 Q. Now, Dr. McCann, this Page 18 was in the first exhibit
7 that we covered when you were on the stand in the first
8 couple of hours. Every number, almost every number that you
9 gave the Court from that point for the rest of the time you
10 testified on retail and chain, did that include the NPI
11 definition of retail and chain or the ARCOS definition of
12 retail and chain?

13 MR. MAHADY: Your Honor, leading.

14 THE COURT: Sustained.

15 BY MR. MOUGEY:

16 Q. Did you use the NPI definition or the ARCOS definition
17 after this slide pointing out the differentiation?

18 A. In each section, when we got to the first time, the NPI
19 definitions were used. The rest of the illustration's
20 subtotals that followed within that packet were -- were
21 based on the NPI definitions.

22 Q. Dr. McCann, when I took a -- when you and I calculated
23 the summary slides for the 81,229,625 dosage units of
24 oxycodone and hydrocodone into Cabell County, did this
25 include just retail and chain pharmacies?

1 **A.** Yes.

2 **Q.** Did 81 million and some change include only the NPI
3 definition?

4 **A.** Yes.

5 **Q.** Are your answers the same for the 980,649,200 dosage
6 units of oxycodone and hydrocodone into Cabell County?

7 **A.** Yes.

8 MR. MOUGEY: No further questions, Your Honor.

9 THE COURT: Is there any recross?

10 MR. MAHADY: Good afternoon, Your Honor.

11 Dr. McCann, I have no additional questions. Thank you
12 for your time.

13 THE WITNESS: Thank you.

14 MR. SCHMIDT: Your Honor, no additional recross.

15 Thank you, Dr. McCann.

16 THE COURT: Ms. Salgado?

17 MS. SALGADO: No additional recross from me.

18 Thanks very much, Dr. McCann.

19 THE COURT: Well, I want to ask you a couple of
20 questions before we turn you loose here, Dr. McCann. I
21 believe you said you -- in considering the ARCos data, you
22 made eight different kinds of changes to that data in
23 constructing the exhibits that have been offered here, the
24 summary charts. One of the things you excluded were the
25 transactions where the action indicator, code correction

1 number, or both, suggests that the reported transaction is
2 erroneous. Just tell me how you made that determination.
3 How did you know it was erroneous?

4 THE WITNESS: Well *The ARCOS Handbook* says that
5 both of those fields can't be filled in simultaneously in a
6 transaction. So, when we saw that, and it's in a very small
7 number of transactions, less than one hundredth of 1%, but
8 where we saw both of those fields filled in, it's
9 inconsistent with *The ARCOS Handbook* and so, we excluded
10 those transactions.

11 THE COURT: You also excluded transactions
12 involving reverse distributors and some other people and you
13 concluded that reverse distributors overstate the quantity
14 of opioids shipped for destruction. How did you know that?

15 THE WITNESS: Well, so the reverse distributors
16 are primarily receiving opioids and shipping them where
17 they're going to be destroyed to analytical labs. Both the
18 reverse distributors and the analytical labs have DEA
19 registration numbers. And so, we could see that the receipt
20 of the -- of the drug by the reverse distributor, typically
21 from a manufacturer or a distributor, we could see it being
22 reported both by the manufacturer and distributor. We can
23 see it simultaneously being reported by the reverse
24 distributor. And then, we see the follow-on transaction to
25 the DEA's destruction facility, the analytical lab. We see

1 both sides identifying it or reporting it, the reverse
2 distributor and the analytical lab.

3 Now, the critical thing is that the analytical lab is
4 reporting one side of the transaction coming from the
5 distributor and one side of it coming -- going on to the
6 analytical lab for destruction. The distributors' and
7 manufacturers' side of that reporting appears to be
8 accurate.

9 The -- on the very same transaction, the reverse
10 distributor reports a quantity that is maybe a million times
11 or a billion times higher. And the same thing when that
12 reverse distributor reports the transaction to the DEA
13 analytical lab for destruction, it's being reported both by
14 the DEA analytical lab and by the reverse distributor.

15 And, again, we see the reverse distributor reporting a
16 number that is maybe a billion times higher than what's
17 coming into the analytical lab. So, the -- it's really one
18 -- primarily one reverse distributor in Alabama that seemed
19 to just code the units wrong, calling something maybe
20 kilograms instead of micrograms, and so they're off by a
21 factor of a million or a billion.

22 It turns out none of those transactions are included in
23 shipments from manufacturers to distributors, but it was
24 fairly easy to see that those were all in error. We could
25 check the reverse distributors' reporting against the

1 distributors of the same transaction. We could also check
2 it against the analytical lab. So, we know that they're
3 wrong.

4 It's not an exaggeration to say that some of the
5 shipments reflect from the -- as reported by the reverse
6 distributor reflect what would be whole trainloads of
7 Fentanyl, which we know were not shipped from Alabama to
8 Miami.

9 THE COURT: Similarly, you eliminated transactions
10 with obvious errors. How do you determine what error is
11 obvious and what isn't? Is that a subjective determination
12 on your part or do you have some objective standard that you
13 use there?

14 THE WITNESS: I don't believe that there was any
15 subjectivity used in any of this. I've tried to lay out the
16 steps. So, for instance, we -- we observed some -- some of
17 the data produced by the government includes and, for that
18 matter, by some of the defendants in their transaction data,
19 some NDC codes that don't reflect opioids. And so, those
20 shouldn't have been included in the production, and we would
21 not -- we would include those.

22 We -- and in another example on that list, there were,
23 as I said, if -- if two DEA registrants are involved in a
24 transaction and they're reporting registrants, both of them
25 report the transaction and we wouldn't count both of those

1 reported transactions. That would be double counting the
2 shipment from one party to another.

3 So, each step we took were instances like that where
4 there was some very obvious reason why that item should not
5 be included. The one that was discussed yesterday at some
6 length was the R transactions and I could articulate why the
7 R transactions were included in the summaries. But for each
8 thing that we did, I believe it was objective and clear. I
9 don't believe there was really any subjectivity.

10 THE COURT: Okay. I want to ask you about the
11 pharmacies that were selected by the plaintiffs' counsel
12 that were outside the geographical area here. If you take
13 those out, would that have changed any of your ultimate
14 conclusions?

15 THE WITNESS: No. I don't believe so. All -- I
16 can elaborate, if you like.

17 THE COURT: Yes, please.

18 THE WITNESS: I apologize. Sometimes my answers
19 are too long.

20 THE COURT: Well, I'm going to exempt you
21 temporarily from that, Dr. McCann.

22 THE WITNESS: Thank you, Your Honor. The primary
23 opinions that I gave were about the levels of opioids that
24 were shipped into Cabell County and West Virginia and I sort
25 of subset those quantities in various ways by year, by

1 distributor, by drug, by drug strength.

2 And then, with Mr. Mougey's help, I pointed out the
3 percentage increases between one year and another year for
4 some of these items. None of that would be affected by not
5 including those pharmacies outside of Cabell County and
6 Huntington.

7 Also, none of that would be affected except
8 imperceptibly by treating the R Transactions differently
9 than we did. So, I don't really believe that any of my
10 conclusions -- and, in fact, I feel confident that none of
11 the conclusions that I expressed would be changed by any of
12 the discussion we've had here the last day and a half.

13 THE COURT: So, if I understand, your testimony is
14 even though you made eight changes to the ARCOS data, eight
15 different types of changes, none of the changes
16 significantly impacted or affected your ultimate
17 conclusions; is that correct? That's a bad question.

18 What I'm driving at is, is the final product ARCOS data
19 or is it yours? Is it your interpretation of that? I mean
20 --

21 THE WITNESS: No. It's ARCOS data. If I may, you
22 could think of -- the most of the reports that I -- I
23 explained were for Cabell County and the City of Huntington.
24 So, if you think about it conceptually, the ARCOS data
25 starts with the entire nation. So, most of my reports

1 narrow down this geographic scope to the City of Huntington
2 and Cabell County.

3 In similar ways, my analysis first narrows the scope to
4 shipments from distributors to pharmacies in Huntington
5 County (sic). So, when you see that I made eight changes, a
6 significant part of that is excluding the transactions that
7 didn't involve shipments from distributors to pharmacies,
8 just like I don't include tables and charts on Washington
9 State. I narrow the geographic scope and then I further
10 narrow the data to be shipments to pharmacies in -- or
11 dispensers generally in Cabell County and the City of
12 Huntington.

13 Once you do that and don't double count by making sure
14 that you're not including the same transaction twice because
15 they're reported by two different registrants, what's left
16 is what I would call corrections after that. And the
17 corrections account for something like less than a tenth of
18 1%, maybe less than five one hundredths of a percent.

19 So, there's -- what I -- what I summarize here is ARCos
20 data with very minimal, very minimal corrections, trivial.

21 THE COURT: Does counsel want to ask him anything
22 based on what I asked him?

23 MR. MAHADY: Your Honor, I think a number of the
24 questions you asked got at the processing of the underlying
25 data. I believe Dr. McCann testified yesterday that there

1 was a distinction between the processing phase of his work
2 and the analysis side of his work.

3 BY MR. MAHADY:

4 **Q.** Would the eight exclusions, Dr. McCann --

5 MR. MAHADY: If I may ask the question?

6 THE COURT: Yes, please.

7 BY MR. MAHADY:

8 **Q.** Did that relate primarily to the processing side of
9 your work to get you a dataset that you could then analyze?

10 **A.** No. The -- at least measured by -- by dosage units, or
11 weight, or MME, the vast majority was narrowing the focus to
12 the shipments from distributors to dispensers. That gets
13 rid of the problem with the reverse distributors and it gets
14 rid of the double counting of the same shipment counted
15 twice in the records. That's the vast majority.

16 And you really should think of that as prior to
17 processing, although you could do -- you could process the
18 entire database and then subset it down to shipments from
19 distributors to dispensers or it's the same logically. You
20 could think of it as narrowing the raw ARCCOS to shipments
21 from distributors to dispensers and then processing from
22 that point. It's the same thing.

23 **Q.** Okay. But the decision not to include transaction
24 codes that may reflect an offset on the shipments, that was
25 not merely processing the data to get it in a useable form,

1 correct? That was a decision that you made in performing
2 your analysis?

3 **A.** Yes. I've offered to explain that three times. No one
4 wants to take me up on it.

5 THE COURT: Well, I'm going to take you up on it
6 right now.

7 THE WITNESS: Thank you, Your Honor. I've been
8 dying. So, there was an example presented to you yesterday
9 in my cross examination of McCloud Pharmacy and one
10 particular month where there was 15,000 pills returned out
11 of I think it was 57,000 gross shipped that month. What --
12 what I wanted to explain is that these R Transactions account
13 for approximately six tenths of 1% of the shipment data and
14 of the -- of the shipments from wholesalers and distributors
15 to dispensers.

16 And there are problems with that R coded data. There
17 are problems with their interpretation and, even if you can
18 agree on the interpretation, there are problems with how it
19 ought to be presented in graphs and tables.

20 A perfect example would be, earlier today, I was asked
21 about switches from self-distributing CVS to, I believe it
22 was Cardinal Health, or perhaps yesterday, switches between
23 one distributor to a Fruth Pharmacy and another distributor.

24 Now, what you see in those R Transactions is if you
25 just look at, for instance, Cardinal Health's shipments to

1 that pharmacy, you see a -- an R Transaction in an NDC code
2 with no prior purchase. So, in the Cardinal Health data
3 right here in Cabell County, in the City of Huntington, you
4 can see lots of examples of returns that -- with no prior
5 purchase of that same NDC code from Cardinal Health.

6 Well, if you dig a little bit deeper, what you'll see
7 is the previous distributor maybe shipped that NDC code to
8 that pharmacy a year earlier. In the intervening year, the
9 pharmacy changes distributors and perhaps it's not an error.
10 Perhaps it really is a return to the Cardinal, the new
11 distributor of an NDC package that was bought at a previous
12 distributor.

13 Now, when I'm calculating market shares, should that
14 return be counted as an offset against the previous
15 distributor, maybe AmerisourceBergen, of a thousand pills or
16 should it be counted as an offset against Cardinal
17 Health's contemporaneous shipments because it was initially
18 shipped by AmerisourceBergen? Should we continue to count
19 that as a thousand pills in the AmerisourceBergen or should
20 we credit AmerisourceBergen and count the full 57,000 pills
21 against Cardinal?

22 It turns out that across all three distributors,
23 whether you're looking at nationally, West Virginia or
24 Huntington and the -- and Cabell County, the percent that
25 these R Transactions plus the Ps, which may reflect a

1 return, account for approximately six tenths of 1% of the
2 shipments.

3 The graph that we're looking at on the white board
4 there would not be changed. If you took out about one-half
5 of 1% of the heights of those bars, the -- the numbers that
6 were in the tables that I presented to you showing the total
7 shipments or the per capita shipments from these
8 distributors would not change beyond the rounding error and
9 the percentage increases over time or the relative
10 magnitudes of the shipments in Cabell County and the City of
11 Huntington to West Virginia and the country would change in
12 no way.

13 So, it was my view -- we do use the R Transactions in
14 some testimony that I'll offer you later in a few weeks, but
15 for purposes of the tables that I put in front of you here
16 this week, those R Transactions don't belong.

17 MR. MAHADY: Your Honor, if I just may ask a few
18 follow-up questions?

19 THE COURT: Yes, please.

20 **CROSS EXAMINATION**

21 **BY MR. MAHADY:**

22 Q. In the case of McCloud Family Pharmacy,
23 AmerisourceBergen was the only pharmacy servicing McCloud in
24 October of 2011, when those 15,200 pills were returned to
25 AmerisourceBergen, correct?

A. Correct.

2 Q. And AmerisourceBergen, based off of your analysis, was
3 not credited with the return of those 15,200 pills, correct?

4 A. Correct.

5 Q. And the chart that you demonstrated to the Court did
6 not reflect AmerisourceBergen being credited with those
7 15,200 pills, correct?

A. Correct, for the reasons I just explained.

9 Q. Okay. And I know you just testified that your work was
10 really the ARCOS data, but a lot of your work and a lot of
11 the charts are based off of per capita analysis and we can
12 agree, right, that you cannot do a per capita analysis just
13 based off the ARCOS data alone? You need to introduce a
14 separate dataset and, in this case, that was the U. S.
15 Census Bureau data, correct, Dr. McCann?

16 **A.** Yes. I wouldn't say it was a lot of what I presented,
17 but to the extent that there were per capita numbers, those
18 are based on -- including the Census data numbers.

19 Q. Okay.

20 MR. MAHADY: I have no further questions, Your
21 Honor. I'm not sure if McKesson or Cardinal do.

22 THE COURT: Mr. Schmidt, do you want to ask him
23 anything?

24 MR. SCHMIDT: Yes. I was going to ask the Census
25 question, but Mr. Mahady covered it, so I'll just ask two

1 others.

2 **CROSS EXAMINATION**

3 **BY MR. SCHMIDT:**

4 **Q.** Do you see that chart up there that's, I think, set up
5 for the next witness that's based on your work, Dr. McCann?

6 **A.** Yes.

7 **Q.** Is that MME data?

8 **A.** Yes. I'm sorry. No, it's calculated base weight in
9 grams.

10 COURT REPORTER: I'm sorry. Could you repeat
11 that?

12 THE WITNESS: It's what's referred to as
13 calculated base weight in grams.

14 COURT REPORTER: Thank you.

15 **BY MR. SCHMIDT:**

16 **Q.** You did perform various MME calculations, correct?

17 **A.** Correct.

18 **Q.** And those MME -- the MME data that you used, that does
19 not appear in ARCOS, correct?

20 **A.** Correct.

21 **Q.** You had to draw documentation and data from the CDC to
22 conduct conversions for the MME data, correct?

23 **A.** Correct.

24 **Q.** And in other of your analyses, including some we just
25 looked at, you used NPI pharmacy types to sort some of your

1 ARCOS data according to those NPI pharmacies types, correct?

2 **A.** Correct.

3 MR. SCHMIDT: Thank you.

4 THE COURT: Ms. Salgado?

5 **CROSS EXAMINATION**

6 **BY MS. SALGADO:**

7 **Q.** Dr. McCann, you testified just now that the exclusion
8 of the R and P data did not affect -- or was diminimous
9 essentially on an aggregate level; is that right?

10 **A.** Correct.

11 **Q.** But you would agree, wouldn't you, that when you drill
12 down to the pharmacy level and particular transactions, for
13 example, in the McCloud example, there could be a material
14 difference in what you're seeing in the transactional level
15 for that pharmacy and what actually occurred; do you agree
16 with that?

17 **A.** Well, there could be, but even in the McCloud case, it
18 accounted -- it amounted to about 2% of the total shipments
19 to McCloud. As I said, on average, it's about seven tenths
20 of a percent across Cabell County, West Virginia and the
21 country. For McCloud, it was around 2%.

22 **Q.** And if we're looking at particular transactions for
23 McCloud, though, it could affect what we see as the
24 particular -- what was shipped in a particular month and
25 whether that volume was particularly high or low? It could

1 impact that, correct?

2 **A.** No. Those are still shipments to McCloud. The only
3 question is whether either earlier in the month or later in
4 the month, if there were -- if there were returns to the
5 distributor, maybe not the distributor that first sent the
6 drugs to McCloud, but if there are returns to the
7 distributor, how they should be treated. And for the
8 reasons I explained for these charts and tables, I don't
9 believe they should be included.

10 Q. Right. And I guess I understand that the other data
11 still reflects the shipments, but the charts that you show
12 may not reflect the net shipments that went from that
13 particular distributor to that particular pharmacy in a
14 particular month if there were returns, correct?

A. Correct.

16 MS. SALGADO: Thank you.

17 MR. MOUGEY: Your Honor, I'm still here behind the
18 podium.

19 THE COURT: Are you back there, Mr. Mougey?

20 MR. MOUGEY: I may have just a couple quick
21 follow-up.

EXAMINATION

BY MR. MOUGEY:

24 Q. The eight, I'll call them categories that Your Honor
25 mentioned, Dr. McCann, are you familiar with the terms

1 correlation coefficient?

2 **A.** Yes.

3 **Q.** Is -- explain to the Court what correlation coefficient
4 is just very 30,000-foot.

5 **A.** Well, it's a measure of how two variables move
6 together, how observations on those two variables relate to
7 one another either what we call positively, if they go up
8 and down together around their averages after you subtract
9 their averages or negatively if they move in opposite
10 directions.

11 **Q.** Is the correlation coefficient a mathematical
12 computation that is routinely used by experts when comparing
13 different datasets?

14 **A.** Yes.

15 **Q.** And were you able in this case, despite the eight
16 categories and some of the issues raised, were you able to
17 perform a correlation coefficient calculation on the ARCos
18 dataset in comparison to the defendant's transactional
19 dataset?

20 **A.** Yes. I report that in my expert report.

21 **Q.** And, Dr. McCann, would you explain the kind of
22 numerical range from perfectly inversely correlated to no
23 correlation to perfectly correlated?

24 **A.** Sure. A negatively correlated, a perfectly negatively
25 correlated variable, would have a -- pair of variables would

1 have a correlation coefficient of minus one and a perfectly
2 positively correlated pair variables would have a
3 correlation coefficient of plus one. You can think of plus
4 one as being really even just the same thing measured twice
5 in different units.

6 So, if we measured people's heights here in inches and
7 then in centimeters, you know, everybody has the same
8 height. It's the same distribution of heights. We're just
9 measuring them two different ways. If you calculate a
10 correlation coefficient across those two series, the
11 correlation coefficient would be one. It would be 1.00.

12 **Q.** Now, Dr. McCann, were you able to calculate the
13 correlation coefficient based on the West Virginia dataset
14 and the defendants' transactional dataset?

15 **A.** Yes.

16 **Q.** And what was that correlation coefficient, Dr. McCann?

17 **A.** Well, we report a couple of different things. I'd have
18 to -- the precise number, I would have to look up, but it's
19 .99-something. These are perfectly correlated, just as the
20 ARCos data, once we've -- we've sort of subset it down to
21 the shipments to dispensers and made the corrections that we
22 made, the correlation between it and the Retail Drug Summary
23 Reports is .999 or something. These are effectively the
24 same datasets.

25 **Q.** Dr. McCann, the pharmacies outside of Cabell County on

1 the larger spreadsheets, were these -- were these given any
2 additional or different weight in the series of summaries
3 than other pharmacies in West Virginia?

4 **A.** No. The statewide average is -- just includes all of
5 the pharmacies and, to the extent there are one or two
6 pharmacies on the spreadsheet that are not in the state,
7 they're not included at all in the calculations.

8 MR. MOUGEY: No further questions, Your Honor.
9 Thank you.

10 THE COURT: And you used the ARCOS data and
11 information submitted by the defendants?

12 THE WITNESS: Correct.

13 THE COURT: And where it overlapped, you made
14 appropriate adjustments?

15 THE WITNESS: Right. The overlap is almost
16 perfect. It's really where they didn't overlap or there
17 might have been a few transactions missing, let's say, from
18 the ARCOS data. Cardinal Health was the example we talked a
19 little bit about.

20 There were three weeks in March of 2008. For some
21 reason, the ARCOS data shows blanks for Cardinal during that
22 time period, but the Cardinal data produced in discovery
23 shows shipments during those three weeks. And so, we import
24 those shipments from the Cardinal data into the ARCOS data
25 before we do the analysis and that's actually necessary.

1 That then allows the ARCOS data to match up with the Retail
2 Drug Summary Reports in that quarter.

3 So, it's -- other than that, there might be -- there
4 might be a few transactions here or there that we found in
5 the defendant transaction data not in the ARCOS data and
6 brought it over, but it was primarily really just those
7 three weeks in March.

8 THE COURT: Okay. Let me -- let me ask counsel,
9 is there any argument about whether the ARCOS data and the
10 defendants' discovery data used by Dr. McCann are admissible
11 in evidence? Is there any argument about the admissibility
12 of any of that?

13 MR. MAHADY: Your Honor, the processed ARCOS data,
14 like the whole set, or are you just talking about --

15 THE COURT: What he used?

16 MR. MAHADY: I don't think that there's an issue
17 with the underlying data or R transactional data. I think
18 where the rub is, is with his analysis and subjective
19 decisions that were made in the supplementation with it.

20 So, as far as AmerisourceBergen goes for R
21 transactional data, I do not think that there is an issue as
22 to whether or not it is admissible. It's more of the
23 analysis. And that's really the rub that we're going to be
24 briefing.

25 MR. SCHMIDT: And that's where we are, as well,

1 Your Honor, for McKesson.

2 MS. SALGADO: Same for Cardinal Health, Your
3 Honor.

4 THE COURT: Well, as I understand it, for Rule
5 1006 apply, the data has to be admissible in evidence. It
6 doesn't have to be admitted, but it has to be admissible; is
7 that right?

8 MR. MAHADY: Right. It has to be -- the
9 underlying data that's being summarized has to be admissible
10 and the summary has to be an objective summary of that data.

11 THE COURT: And you're telling me that you don't
12 have any quarrel about the admissibility of the underlying
13 data, right?

14 MR. MAHADY: I think that's correct, Your Honor.

15 MR. SCHMIDT: Our quarrel is with the adjustments
16 that have been made to it and merging datasets.

17 THE COURT: Right. I understand that.

18 MS. SALGADO: Yes, Your Honor.

19 MR. MOUGEY: I agree that's where the difference
20 is and that's what we're going to brief, Your Honor.

21 THE COURT: May Dr. McCann be temporarily excused?

22 MR. MAHADY: Yes.

23 MS. SALGADO: Yes, Your Honor.

24 MR. MAHADY: He may not come back.

25 THE COURT: Dr. McCann, thank you very much.

1 You're free to go until you have to come back.

2 THE WITNESS: Thank you. If I may, Your Honor,
3 it's been a pleasure and an honor. Thank you.

4 THE COURT: Thank you.

5 All right. Here's what I'm going to do on the -- on
6 the big issue. I'm going to conditionally admit the
7 summaries under Rule 1006 at this time subject to possibly
8 revising or reversing that ruling after I receive the briefs
9 and allow the plaintiffs to proceed and use the summaries in
10 their questioning, but with a warning. They do so at their
11 peril. If I ultimately determine that the charts are not
12 admissible, that may require striking some or all of the
13 accompanying testimony.

14 So, rather than delay things, I'm going to -- we're
15 going to move forward on that basis and you all can put your
16 objections on the record, if you wish.

17 MR. SCHMIDT: Yes. I think we've maintained our
18 objections on the 1006 and will through our briefing. It's
19 not ripe now, but I do want to flag a subsidiary issue,
20 which is this geographic scope issue, particularly with
21 respect to the pharmacies outside of Huntington-Cabell. I
22 think it is a distinct issue and I think that will come up
23 in the context of specific witness testimony, but I just
24 wanted to put a marker down for that.

25 MS. SALGADO: Same objections, Your Honor.

1 THE COURT: Mr. Mahady?

2 MR. MAHADY: Same objections, Your Honor.

3 THE COURT: All right.

4 All right. Mr. Farrell, if you're ready to go, you can
5 call your next witness.

6 MR. FARRELL: Yes, sir. Plaintiffs call Chris
7 Zimmerman.

8 Judge, if you don't mind, we've got just a few minutes
9 of moving papers.

10 THE COURT: No, not at all.

11 (Pause)

12 THE COURT: Mr. Zimmerman, you may take the
13 witness stand. Wait a minute.

14 LAW CLERK: Wait.

15 THE COURT: She needs to swear you first.

16 THE WITNESS: Oh, I'm sorry.

17 LAW CLERK: Please raise your right hand.

18 **CHRIS ZIMMERMAN, PLAINTIFF WITNESS, SWORN**

19 COURTROOM DEPUTY CLERK: Thank you. Please be
20 seated.

21 MR. MAHADY: Judge, we have a pileup of documents
22 the witnesses have been seeing. Your Honor, may I come up
23 here just to grab this stuff?

24 THE COURT: Yes, please.

25 **DIRECT EXAMINATION**

1 **BY MR. FARRELL:**

2 **Q.** Good afternoon. Would you please state your name for
3 the record?

4 **A.** Good afternoon. My name is Chris Zimmerman.

5 **Q.** And which of the parties here are you identified with?

6 **A.** I identify with the AmerisourceBergen Drug Company.

7 **Q.** What is your current role?

8 **A.** My current title is Senior Vice President of Corporate
9 Security and Regulatory Affairs.

10 **Q.** Mr. Zimmerman, you've been employed with
11 AmerisourceBergen since 1990?

12 **A.** That's correct.

13 **Q.** And my records or my notes indicate that you took the
14 role of Vice President of Corporate Security and Regulatory
15 Affairs sometime in 2001; is that accurate?

16 **A.** That's accurate, correct.

17 **Q.** Approximately when in 2001?

18 **A.** I think it was probably -- it was after the merger, so
19 probably around August. I'm not sure.

20 **Q.** The merger, I think, is March of 2001, so does that
21 give you a better idea?

22 **A.** So, it would have been -- let me rephrase that. I
23 think it was towards the end of 2001. I'm not sure exactly
24 the month.

25 **Q.** And so, Corporate Security and Regulatory Affairs, the

1 shorthand for that at AmerisourceBergen is CSRA; is that
2 right?

3 **A.** That's correct.

4 **Q.** So, I may use that as shorthand as we -- as we move on.

5 **A.** Most people have forgotten about the Corporate Security
6 and Regulatory Affairs part. CSRA is quite normal.

7 **Q.** The other reference point I saw is that your title
8 sometimes was shortened from Senior Vice President of
9 Corporate Security and Regulatory Affairs down to Chief
10 Compliance Officer. Is that a fair depiction?

11 **A.** No. I've always -- since that 2001 time frame, I've
12 always been Senior Vice President of CSRA and there was a
13 period of time where I was, in addition to that, also the
14 Chief Compliance Officer.

15 **Q.** That's a separate role?

16 **A.** It's a separate title. Additional title. Both titles.

17 **Q.** I'm going to try and front-end to load in some facts
18 for the record. As the Senior Vice President of CSRA, do
19 you acknowledge that AmerisourceBergen sold 36 million pills
20 of hydrocodone and Oxycodone to pharmacies in Huntington and
21 Cabell County?

22 **A.** I don't --

23 MR. NICHOLAS: Objection. I'll object for lack of
24 foundation.

25 THE COURT: Well, what do you have to say about

1 that, Mr. Farrell?

2 MR. FARRELL: Well, I would find it interesting if
3 the Vice President of Corporate Security and Regulatory
4 Affairs doesn't know how many pills were sold.

5 THE COURT: Well, do you know the answer to that,
6 Mr. Zimmerman?

7 THE WITNESS: I don't know the exact number of
8 pills that were sold.

9 THE COURT: I'll sustain the objection.

10 BY MR. FARRELL:

11 **Q.** At any point in time have you looked to determine how
12 many pills AmerisourceBergen sold to Huntington, Cabell
13 County, West Virginia?

14 **A.** Me personally?

15 **Q.** You personally?

16 **A.** No.

17 **Q.** How about anybody under your -- your command?

18 **A.** The people in my department are constantly looking at
19 data in certain areas and customers and pharmacies. That's
20 just part of their normal duty.

21 **Q.** Are you aware of how many pills of hydrocodone and
22 oxycodone were sold by AmerisourceBergen to SafeScript
23 Pharmacy in Huntington, West Virginia?

24 **A.** I don't know the exact number, no.

25 **Q.** And can you estimate?

1 **A.** I wouldn't want to estimate, no.

2 **Q.** Well, the same applies to any other pharmacy in
3 Huntington and Cabell County. Sitting here today, you do
4 not know the numbers of pills sold by AmerisourceBergen?

5 **A.** I don't know the exact number of pills and I'm not sure
6 if your question is for like annually, what length of time
7 period.

8 **Q.** Well, if I were to modify my question to include a time
9 increment like annually or monthly, would that -- would you
10 be able to offer any testimony on that?

11 **A.** No. I wouldn't know the exact numbers for any of that.

12 **Q.** And I'm not -- I'm not asking you to memorize or guess.
13 I'm just trying to get a feel before we go down the road of
14 what your knowledge base is.

15 **A.** I --

16 **Q.** I'd like --

17 **A.** Oh, sorry.

18 **Q.** Go ahead.

19 **A.** I was going to say, I know we've sold products into
20 those counties and those customers. I just don't know the
21 exact number.

22 **Q.** I want to talk briefly about your chain of command.

23 MR. FARRELL: And I understand that the -- there
24 was an objection to the front page.

25 MR. NICHOLAS: I'm just not -- I'm not clear on

1 the document. I need to understand better what you've done
2 on the front page.

3 MR. FARRELL: Okay. Well, how about we just do it
4 as a demonstrative?

5 Can you bring up -- can you bring up the chain of
6 command with the Demo 213? Do I need to hit a button?
7 There we go.

8 Judge, may I step down?

9 THE COURT: Yes.

10 BY MR. FARRELL:

11 **Q.** Mr. Zimmerman, I don't know if you can see this or read
12 this or not. I think it's on your camera, as well. I'll
13 represent to you that we're not going to enter this into the
14 record, but in general, I'll represent to you in good faith
15 that this is a document produced by AmerisourceBergen with a
16 chain of command sometime around 2007 and do you recognize
17 the general structure of -- that's contained within this
18 document?

19 **A.** I do.

20 **Q.** Okay. Have you seen this document before?

21 **A.** I've seen a lot of charts in my department and that --
22 I recognize the individuals in the boxes, so --

23 **Q.** Would you say that this document, this Demo 213, Page
24 1, is an accurate depiction of the chain of command for
25 AmerisourceBergen CSRA in approximately 2007?

1 MR. NICHOLAS: Well, I'll object for lack of
2 foundation at this point. I mean, he's asking about an org
3 chart in 2007. I'm not sure it's -- I'm just not sure it's
4 --

5 THE COURT: Well, he said he didn't recognize the
6 document, if I understood his testimony.

7 Do you or do you not recognize this as an accurate
8 diagram, for want of a better term, for AmerisourceBergen at
9 that time?

10 THE WITNESS: At that time frame, it looks -- it
11 looks like it could have been. That's the --

12 THE COURT: Okay. I'll overrule the objection.

13 BY MR. FARRELL:

14 **Q.** So, at the top of the chain of command would be you,
15 Chris Zimmerman, CSRA, agreed?

16 **A.** Correct.

17 **Q.** And then it looks like there is a pyramid of people
18 that you supervise or oversee. Is that a fair depiction of
19 what this diagram is intended to portray?

20 **A.** Those are my -- correct, the reporting structure.

21 **Q.** This is the reporting structure that you supervise and
22 oversee, yes?

23 **A.** Correct.

24 **Q.** In this, it looks like that Mr. Paul Ross, Bob Crow,
25 Mr. Bruce Gundy, Mr. Mike Mapes and Mr. Steve Mays report

1 directly to you.

2 MR. NICHOLAS: Your Honor, I'm just -- this is a
3 minor objection, but he's using the present tense and he's
4 saying -- he's talking about this as if this is a current
5 organization and it's not.

6 THE COURT: All right. I'll sustain the
7 objection. You can put it in a time frame, Mr. Farrell, if
8 you can.

9 MR. FARRELL: Yes, sir.

10 BY MR. FARRELL:

11 Q. I'm going to write here. I'm going to write here in a
12 different color the numbers 2007. So, just in general, this
13 would be what your chain of command looks like in the year
14 2007?

15 A. Approximately, yes.

16 Q. All right. The next org chart that we pulled is for
17 sometime around 2011.

18 Can we bring that one up? Well, go to the next one.
19 Yes, that's it. I think that's it.

20 And, again, it's not a memory contest, but there was an
21 expansion of the CSRA by AmerisourceBergen and does this
22 document look like a fair depiction of the chain of command
23 for CSRA in sometime around 2011?

24 A. There's no date on it. It does.

25 Q. And I just -- the only reason I really want to do this

1 is because we're going to go through some documents later
2 with names and I want to go through now and have you
3 identify some of the people. It's sort of like the
4 beginning of a playbill where you see the cast of
5 characters. So, at the very top you see it says "Chris
6 Zimmerman". That would be you, correct?

7 **A.** Correct.

8 **Q.** All right. We'll start to the left. Mike Mapes, do
9 you know Mike Mapes?

10 **A.** I do.

11 **Q.** Did he work for you?

12 **A.** He is a consultant.

13 **Q.** And did he consult for you in your role as the Vice
14 President of CSRA?

15 **A.** He consults for the department, correct.

16 **Q.** And is he still there working?

17 **A.** No.

18 **Q.** But at some -- at points in time, he was within the
19 command structure and under your supervision?

20 **A.** As a consultant.

21 **Q.** And what about Steve Mays, what was his title and --
22 who is he and what did he do?

23 **A.** Reading that org chart at that time, he was the Senior
24 Director of Drug Distribution.

25 **Q.** What does that mean?

1 **A.** So, he's responsible for CSRA for the drug distribution
2 business.

3 **Q.** Okay. How about Bruce Gundy, do you recognize that
4 name?

5 **A.** Yes.

6 **Q.** And it says here "Director of Corporate Security and
7 Investigations". What does that job do under your command?

8 **A.** So, Bruce Gundy does -- he's exactly what it says.
9 He's -- well, it's titled Director of Investigations. So,
10 he conducts investigations.

11 **Q.** What would he be investigating?

12 **A.** Anything from workplace violence, theft, shrinkage,
13 contract diversion, counterfeit product, anything on the
14 security --

15 **Q.** How about -- how about suspicious orders?

16 **A.** At one time, he could be involved. He could be also
17 involved in that portion, as well.

18 **Q.** How about Clifford Flood, do you recognize that name?

19 **A.** I do.

20 **Q.** Okay. Who is Clifford Flood?

21 **A.** That slide says his title is Investigator at that
22 point. He's no longer with the company.

23 **Q.** How about Robert Crow?

24 **A.** Bob Crow. Robert Crow, yes. He's -- what's his title?
25 The Director of Corporate Security.

1 Q. How about Ed Hazewski? It says Manager Diversion
2 Control.

A. Correct.

4 Q. Do you know Ed Hazewski?

5 **A.** I do.

6 Q. Okay. What is Ed's role?

A. Ed's role was to oversee the Diversion Control Program.

8 Q. And what does diversion control mean?

9 **A.** Diversion control means the oversight of the customer
10 due diligence and the order monitoring processes.

11 Q. And we'll talk about that a little bit later, OMP. OMP
12 stands for order monitoring processing?

13 | A. Program.

14 Q. Program? All right. Underneath Ed Hazewski is Kevin
15 Kreutzer, DCP Specialist. Do you know Kevin Kreutzer?

16 | **A.** I know Kevin, yes.

Q. Does he work under you?

18 **A.** He works under -- yeah, he works under me. He is wit
19 -- still with the company.

22 THE WITNESS: Yes. I'm sorry.

23 BY MR. FARRELL:

24 Q. So, for nomenclature, is this a division, a department,
25 a section? What do we call this CSRA?

1 **A.** We would call it a department.

2 **Q.** A department? Okay. So, Kevin Kreutzer works in your
3 department?

4 **A.** Correct.

5 **Q.** Okay. What about Joe -- and I'm going to butcher this
6 name.

7 **A.** Tomkiewicz.

8 **Q.** Tomkiewicz. Do you know Joe Tomkiewicz?

9 **A.** I do.

10 **Q.** Does he work in your department?

11 **A.** He did at that time.

12 **Q.** Okay. How about David Breitmeyer, does he work in your
13 department?

14 **A.** He did at that time.

15 **Q.** Now, moving over here to the left side, it looks like
16 from -- there are other -- at this point in time, in 2011,
17 it looks like there are five direct reports to you; is that
18 accurate?

19 **A.** I count seven, eight.

20 **Q.** Oh, I see. I apologize. You're right. Let's do this.
21 Paul Ross, who is Paul Ross?

22 **A.** Senior Director of Pharmacy and Specialty.

23 **Q.** And what's his job?

24 **A.** He is responsible for the other non-distribution
25 businesses.

1 **Q.** So, I missed the line.

2 **A.** And then Nicole down there next to Ed Hazewski.

3 **Q.** And she's the Facilities Manager. What's that mean?

4 **A.** And for a brief time, Facilities Department reported up
5 into my group, which is, you know, your office buildings and
6 stuff like that.

7 **Q.** So, I'm going to change the color so we can see it, but
8 it looks like from the drawing that Robert "Bob" Crow would
9 report to you, correct?

10 **A.** At this point in time, yes.

11 **Q.** Bruce Gundy would report to you?

12 **A.** Yes.

13 **Q.** Paul Ross would report to you?

14 **A.** Yes.

15 **Q.** Steve Mays would report to you?

16 **A.** Yes.

17 **Q.** Mike Mapes would report to you?

18 **A.** As a consultant.

19 **Q.** As a consultant.

20 Ed Hazewski would report to you?

21 **A.** Yes.

22 **Q.** And Nicole Frost would report to you?

23 **A.** Correct.

24 **Q.** All right. I'm also going to identify a few other
25 names that will be -- we'll be saying throughout. The next

1 is Eric Cherveny. Do you know Eric?

2 **A.** I do.

3 **Q.** Did I pronounce his name correctly?

4 **A.** Cherveny.

5 **Q.** Cherveny? Who is Eric Cherveny?

6 **A.** At that time, he looks like he was the Regional
7 Director for the East Region.

8 **Q.** And what does that mean?

9 **A.** So, the drug distribution company is broken into
10 several regions and each region has a Director of CSRA that
11 oversees the operations at the individual distribution
12 centers, which each has a manager, which are those yellow
13 boxes that drop down, Compliance Managers, and then there's
14 a subset of specialists and lead specialists underneath the
15 managers at each of the distribution centers.

16 **Q.** So, in the blue, the blue would be a regional manager
17 for a distribution center, correct?

18 **A.** For a region of distribution centers, not one
19 distribution center.

20 **Q.** So, an East Region, there would be one, two, three,
21 four, five, six distribution centers, correct?

22 **A.** Correct.

23 **Q.** And then -- so, Cathy Marcum is the North Region
24 Director. Do you know Cathy Marcum?

25 **A.** I do.

1 **Q.** All right. And it looks like that Cathy is in charge
2 of one, two, three, four, five, six, seven distribution
3 centers; is that a fair conclusion?

4 **A.** That's -- those are the boxes under it at that time,
5 yes.

6 **Q.** Now, I'm going to circle one particular name and that's
7 Eric Martin. Do you know Eric Martin?

8 **A.** I do or did. He's no longer with the company, but yes.

9 **Q.** That's -- for some period of time, Eric Martin was
10 employed by AmerisourceBergen?

11 **A.** Yes.

12 **Q.** He was in CSRA?

13 **A.** Yes.

14 **Q.** And he was the Distribution Center Manager for one of
15 the distribution centers, agreed?

16 **A.** That's correct, at that time.

17 **Q.** And which distribution center, if you recall?

18 **A.** I don't. He moved. He was in several different ones.
19 I don't know which one. That one, it doesn't have a name on
20 it, but he was a Compliance Manager, and I believe he -- at
21 that time, he was a Compliance Manager at one of the DCs.

22 **Q.** And so, does that mean he was the boss of the
23 distribution center?

24 **A.** No. No, no. The CSRA is a completely separate
25 function than the operational function of the distribution

1 center, specifically focused on regulatory and security
2 issues, making sure divisions are doing what they need to
3 do.

4 **Q.** So, there would be somebody in charge of a distribution
5 center for operations?

6 **A.** You would have a district -- you would have a
7 Distribution Center Manager that would be in charge of the
8 entire operation, correct.

9 **Q.** And that would be outside of this chain of command?

10 **A.** Correct.

11 **Q.** And then, you would have somebody within your chain of
12 command assigned to a distribution center in charge of CSRA?

13 **A.** Correct.

14 **Q.** And that would include making sure things don't get
15 stolen, correct?

16 **A.** That's one.

17 **Q.** It would make sure you have a safe workplace?

18 **A.** Correct.

19 **Q.** And it would execute its duties to prevent diversion of
20 controlled substances?

21 **A.** Correct. Make sure the divisions were following all
22 the appropriate policies and procedures that you would find
23 in the Code of Federal Regulations.

24 **Q.** I'm going to circle, I think, one more. That would be
25 a Greg Madsen. Do you know who Greg is?

1 **A.** Yes.

2 **Q.** Who is Greg? Who is Greg Madsen?

3 **A.** Greg's the Regional Director at that time for the West
4 Region.

5 **Q.** All right. So, to be clear, all of these people in
6 your department, you're in charge of?

7 **A.** In one way or another, yes. They all roll up to me.

8 **Q.** And you're responsible for their training?

9 **A.** Yes.

10 **Q.** You're responsible for them following guidelines and
11 policies?

12 **A.** Ultimately.

13 **Q.** This is your department?

14 **A.** It's my department.

15 **Q.** And I believe I've caught all of the names that we're
16 going to get to, but can we -- can we go to the very next
17 slide please?

18 You know what I'm going to do is, I'm going to see, if
19 I don't screw this up, I think I can save this. You know
20 what? We'll come back to it if we can.

21 All right. So, I believe this is the next iteration in
22 my notes, and I won't hold you to it, sometime around 2015.
23 And the only reason I bring it up is because there's a
24 couple of new names that I want to identify so that we know
25 who they are and I'm going to give you the privilege of

1 introducing one of the next witnesses and that would be
2 David May. Do you know David May?

3 **A.** I do.

4 **Q.** And he's identified in this as the Senior Director
5 Diversion Controls and Federal Investigations; is that
6 right?

7 **A.** At that time period, correct.

8 **Q.** All right. So, was Mr. May hired by you?

9 **A.** Yes.

10 **Q.** Did you interview him?

11 **A.** I did.

12 **Q.** Did you think he was qualified?

13 **A.** I did.

14 **Q.** And why did you think he was qualified?

15 **A.** His experience. Based upon his experience and I
16 figured he would fit our department well. It was a good
17 hire.

18 **Q.** What experience did Mr. May have that you thought would
19 fit well in CSRA at AmerisourceBergen?

20 **A.** He had -- he was a former DEA agent. He had a
21 different -- a little bit different perspective on things
22 than Mike Mapes that was on the diversion side of DEA that
23 we used as a consultant in the past. And he had also had
24 some complex investigation background in his history. So,
25 he could handle -- had a multitude of skills, whether it's

1 investigatory or administratively in just handling large
2 projects, as well, based upon his past experience.

3 **Q.** And it looks like he's a direct report to you now,
4 correct?

5 **A.** Correct.

6 **Q.** But it looks like that Mr. Steve Mays is still in the
7 chain of command and he's also going to testify here today.
8 Can you talk very briefly about the dual roles Steve Mays
9 and David May play, how they interact?

10 **A.** Today? Like current that time or the -- when this
11 presentation was?

12 **Q.** Well, to save some time, from a macro view, what -- was
13 Steve Mays demoted?

14 **A.** No.

15 **Q.** Was David May inserted in the leadership command
16 structure?

17 **A.** He was -- yes.

18 **Q.** And in what capacity was he inserted?

19 **A.** He was inserted -- I'm looking at the org chart. So,
20 he -- he took over the Diversion Control Program at that
21 time. Steve Mays was Senior Director of Regulatory, as I
22 explained, and was in charge of the distribution centers and
23 the CSRA requirements. The Diversion Control Program is the
24 Customer Due Diligence and Order Monitoring Program.
25 Separate functions. There's an evolution to the timeline.

1 I mean, if you want me to --

2 **Q.** Absolutely.

3 **A.** So, in -- so, the evolution of the time frame is that
4 we've always had -- CSRA always included our Code of Federal
5 Regulations and our responsibility to prevent diversion. WE
6 just didn't have it called Diversion Control Program. It
7 was embedded into the --

8 **Q.** I'm going to interrupt you real quick only to give -- I
9 promise I'm not going to be rude -- to ask you to slow down.

10 **A.** Oh, I'm sorry.

11 **Q.** Because the court reporter will like me more if you do.

12 **A.** Okay.

13 **Q.** So, starting over, what's the evolution of OMP?

14 **A.** Not evolution, but just -- you know, you're going
15 through the org charts. I just wanted to make sure I didn't
16 lose any contacts, right? So, the CSRA Group always was
17 responsible for DEA Code of Federal Regulations
18 responsibilities to have adequate --

19 COURT REPORTER: What was that? Adequate? What
20 was it?

21 THE WITNESS: You did tell me to slow down.

22 Sorry. I don't remember. Apologize for that. What was the
23 --

24 BY MR. FARRELL:

25 **Q.** Adequate controls to prevent --

1 **A.** To prevent -- to prevent diversion under the Code of
2 Federal Regulations. We just broke out a portion of those
3 requirements in the Diversion Control Program at sometime,
4 you know, 2007 forward.

5 Steve's been with the company for 45 years so, he's
6 been dealing with those requirements for the last 45 years.
7 The people that you'll see in senior -- in the director
8 levels have also dealt with those policies and procedures
9 for all of those years.

10 So, when we broke out the Diversion Control Group, at
11 one point, Ed briefly reported to me, but also reported to
12 Steve. And then, we decided to bring David in to take over
13 the Diversion Control Program.

14 Steve still maintains the operational responsibilities
15 that you see underneath in each of the distribution centers
16 because they're a little bit different in responsibilities.
17 The Diversion Control Program is more of a corporate
18 function. It has tentacles into the -- unfortunately, the
19 distribution isn't as simple as it seems, so they -- they do
20 work closely -- all of those groups work closely with one
21 another.

22 **Q.** Let me see if I captured this right. You said
23 diversion control is more of a corporate function?

24 **A.** The Diversion Control Department, but diversion control
25 is embedded in everything within CSRA. So, part of

1 diversion control for a distributor is having adequate
2 security controls. So, you have to have cases involved
3 within the distribution centers. Well, that's not the
4 portion that's corporate. That's very specific to the
5 distribution center and so that we make sure those
6 requirements are followed by the -- the yellow boxes there
7 at each of the distribution centers.

8 **Q.** Mr. Zimmerman, is there a difference between, in your
9 mind organizationally, between Corporate Security and
10 Regulatory Affairs? Is there a difference between the CS
11 and the RA?

12 **A.** Over time, we've tried that, right, but we've just
13 never -- they're intertwined. And when I started with the
14 company 30 years ago, the department was called the Security
15 Department and I was a Security Investigator during my first
16 few years and I don't think regulatory got added to the
17 title until the group -- even though we were performing DEA,
18 Board of Pharmacy, those type of regulatory requirements way
19 back then, most of those, we were just called the Security
20 Department. So, they've always been closely intertwined.

21 **Q.** Before we get to the individual functions, I want to
22 re-visit. Have the number of distribution centers operated
23 by AmerisourceBergen involving controlled substances
24 remained the same over the past 20 years?

25 **A.** Rough last 20 years, you say? Yes. At the time of the

1 merger, we had two companies coming together and there was a
2 lot of divisions. I don't know, 55, however many. And
3 then, over time, we consolidated them into -- where we had
4 two in the same city, we would consolidate them. And then,
5 it got down to the 25-30 has been a pretty good number over
6 that time.

7 **Q.** So, today, how many distribution centers does
8 AmerisourceBergen have?

9 **A.** I think they have 27.

10 **Q.** 27? And, in 2010, can you estimate or do you know how
11 many distribution centers there were?

12 **A.** I would say it wouldn't be too far one way or another
13 from that.

14 **Q.** All right. Are you familiar with the location of
15 Huntington-Cabell County, West Virginia?

16 **A.** I -- I mean, it's in West Virginia, yeah.

17 **Q.** Have you ever been to Huntington-Cabell County, West
18 Virginia?

19 **A.** I have not.

20 **Q.** You know you're in Charleston, Kanawha County, West
21 Virginia?

22 **A.** Yes.

23 **Q.** Okay. So, do you know which of your distribution
24 centers ship to pharmacies in Huntington-Cabell County, West
25 Virginia?

1 **A.** I believe it's Columbus Distribution Center and now we
2 call it Lockbourne. It's a newer facility.

3 **Q.** Yes, sir. Why do you call it Lockbourne?

4 **A.** I think that's the city it's in.

5 **Q.** And that's near Columbus?

6 **A.** Yeah. Must be a subsidiary, yeah.

7 **Q.** And just for purposes of clarity, can you bring up
8 44711_28?

9 This is a chart that has been referenced on several
10 occasions taken from the ARCOS data and it's simply -- this
11 is 44711_28. This is the pie charts of the distribution
12 centers. There we go.

13 I'm going to represent to you that on the left-hand
14 side here, you'll see AmerisourceBergen, and do you
15 recognize what I just circled there?

16 **A.** Yes.

17 **Q.** What is that?

18 **A.** Our logo -- or was our logo. Not any longer.

19 **Q.** Like, but literally, what is it?

20 **A.** What is the logo?

21 **Q.** Yes.

22 **A.** So, at the time of the merger, they came up with -- I
23 was with Bergen Brunswig, Amerisource, they combined the
24 names and they -- the story behind the logo is that is like
25 the -- a sail, but each of those lines are all coming

1 together as one at the bottom. You know, I don't -- I'm not
2 -- I'm not a marketing person. I'm a -- that's the purpose
3 of it.

4 **Q.** *E pluribus unum, out of many come one?*

5 **A.** Yeah, I guess.

6 **Q.** So, in this distribution pie chart, it has identified
7 what looks to be 98% of the pills coming from Lockbourne,
8 Ohio Distribution Center. Does that sound about right based
9 on your knowledge of geography?

10 **A.** I know they've distributed the majority. I don't --
11 you know, I don't know if it's 98, or 95, or 100.

12 **Q.** Do you have a number of -- currently, how many people
13 do you supervise in CSRA?

14 **A.** Direct reports or within the department?

15 **Q.** Both.

16 **A.** My direct reports just changed a little bit, so it's
17 probably -- I think it's eight right now.

18 **Q.** And how many of -- how many employees? How many staff
19 members?

20 **A.** I believe we're about around 150.

21 **Q.** All right, Doc -- or, Mr. Zimmerman, I've got a couple
22 of follow-up questions for you. Let's talk about the
23 function of CSRA. You would agree with me that
24 AmerisourceBergen is responsible for maintaining effective
25 control to prevent diversion?

1 **A.** Right. Well, products under our care, correct.

2 COURT REPORTER: I'm sorry. What was that?

3 THE WITNESS: When products are under our control,
4 that's correct. That's our responsibility.

5 **Q.** We'll put a pin in that. I promise we'll come back to
6 that.

7 **A.** Okay.

8 **Q.** In general, will you agree with me that
9 AmerisourceBergen is responsible for maintaining effective
10 control to prevent diversion of controlled substances?

11 **A.** While under our DEA registration, correct.

12 **Q.** While under your DEA registration?

13 **A.** Correct.

14 **Q.** What does that mean?

15 **A.** So, the way the closed system works in the DEA is they
16 designed it that each element is responsible for their
17 adequate controls diversion and their own security and
18 safety and record keeping requirements based upon their
19 categories. The manufacturers have their own requirements.
20 Distributors have their own requirements. Pharmacies have
21 their own requirements. And prescribers have requirements
22 that they have to have a DEA license.

23 So, while -- to practice under your DEA license, you
24 have to have adequate security controls. You have to have
25 inventory controls. There's reporting processes that you're

1 required to perform.

2 Whether it's inventory or loss reporting, destruction
3 reporting; and then, there's also suspicious order reporting
4 requirement. And, lastly, you need to make sure that the
5 customer you sell to, you make a good faith effort they have
6 a license to take possession of the product.

7 Once they sign for that product then, their
8 registration takes over the adequate controls to prevent
9 diversion. So, the pharmacy must have similar-type
10 processes and requirements in place to protect the drugs.

11 **Q.** I'm going to try to distill down exactly where perhaps
12 you and I are going to diverge this afternoon.

13 **A.** Okay.

14 MR. NICHOLAS: Your Honor, I will object to the --
15 that kind of commentary.

16 THE COURT: Sustained.

17 MR. FARRELL: I apologize.

18 BY MR. FARRELL:

19 **Q.** In the closed chain of distribution, you have
20 manufacturers, correct?

21 **A.** Correct.

22 **Q.** They're the ones that make the pills, agreed?

23 **A.** They make the pill -- if you're talking about -- are we
24 going to talk about controlled substance? I mean, it --
25 there's different requirements depending on what type of

1 products you're handling. And so, as a distributor, we
2 handle all classes of trade, prescription controls, opioids.
3 So, if you're a controlled substance manufacturer, just so
4 I'm clear --

5 **Q.** I appreciate clarity. For purposes of this next hour
6 or so, we're going to be talking about controlled
7 substances. You're familiar with controlled substances?

8 **A.** Yes.

9 **Q.** And controlled substances include narcotics?

10 **A.** Correct.

11 **Q.** And they include Schedule II narcotics made from opium?

12 **A.** They -- yes.

13 **Q.** And that includes hydrocodone and oxycodone?

14 **A.** Hydrocodone now -- I mean, it's been rescheduled to a
15 II, but previously it was a III, right.

16 **Q.** So, today, hydrocodone opiate pills and oxycodone
17 opiate pills are Schedule II narcotics regulated by the
18 Controlled Substances Act?

19 **A.** That's correct.

20 **Q.** There was a period of time where hydrocodone pills
21 called HCP, or hydrocodone combination products, were
22 Schedule III?

23 **A.** Correct.

24 **Q.** Okay. So, Schedule II controlled substances are
25 defined in the Controlled Substances Act as substances with

1 a high potential for abuse; agreed?

2 **A.** That's how the scheduling system works, I agree.

3 **Q.** I'm asking you, the Controlled Substances Act, the
4 pills, the opiate pills that AmerisourceBergen is selling,
5 are pills that have a high potential for abuse; agreed?

6 **A.** The Schedule II drugs have a -- are a Schedule II
7 because of their high potential for abuse and we sell them,
8 correct.

9 **Q.** And that these pills have severe restrictions on them
10 according to the Controlled Substances Act?

11 **A.** I'm not sure what restrictions you're referring to.
12 The regulations that are established in the Code of Federal
13 Regulations based upon the Act?

14 **Q.** I'll read it to you. Under -- this is under Section
15 812(b) (2) (a), and it says that if you're a Schedule II drug,
16 the drug or other substance has a high potential for abuse.
17 You agree with that?

18 **A.** Yes.

19 **Q.** The second section, (b), says, "The drug or other
20 substance has a currently accepted medical use in treatment
21 in the United States or a currently accepted medical use
22 with severe restrictions." You agree with that?

23 **A.** If that's what it says. I mean, I'm not familiar with
24 what you're reading from, but -- I mean, you're reading from
25 the Controlled Substances Act, but I don't know if that's

1 exactly what it says, but --

2 **Q.** If I've read it accurately, that's what it says?

3 **A.** Yes.

4 **Q.** And then (c) says that, "Abuse of a Schedule II drug
5 may lead to severe psychological and physical dependence."
6 You agree with that?

7 MR. NICHOLAS: Your Honor, I will only object
8 because if the witness is going to be asked if that's what
9 it says, then I think he ought to be shown the document.

10 THE COURT: Well, how about that, Mr. Farrell?

11 MR. FARRELL: I think you would probably enjoy him
12 reading it as much as you enjoy hearing me read it.

13 THE COURT: Well, show it to him.

14 MR. FARRELL: Okay.

15 BY MR. FARRELL:

16 **Q.** Under the Controlled Substances Act, are you aware of
17 the purpose of scheduling these drugs?

18 **A.** Yes.

19 **Q.** Okay. Do you have it memorized?

20 **A.** No. I --

21 **Q.** Would you like to see it?

22 **A.** I don't have -- you asked if I had it memorized.

23 **Q.** Yes. Do you know what the Controlled Substances Act
24 says is the purpose for enacting these laws?

25 **A.** No.

1 **Q.** Okay.

2 MR. FARRELL: Judge, may I approach?

3 THE COURT: Yes.

4 BY MR. FARRELL:

5 **Q.** I'm going to show you what is marked 801 and will you
6 read for the record what the title is?

7 **A.** You want me to read?

8 **Q.** The title of 801, bottom left-hand corner.

9 **A.** "Congressional findings and declarations of controlled
10 substances."

11 **Q.** And you see where I've highlighted Section I? Or I've
12 highlighted Section II. I'll have you read Section I aloud,
13 please.

14 **A.** "Any of the drugs included within this sub-chapter have
15 a useful and legitimate medical purpose and are necessary to
16 maintain the health and general welfare of American people."

17 **Q.** Do you agree with that?

18 **A.** I do.

19 **Q.** What about Paragraph 2, will you read that, please?

20 **A.** "The illegal importation, manufacturing, distribution"

21 --

22 COURT REPORTER: I'm sorry. Can you slow down for
23 me, please?

24 THE WITNESS: "The illegal importation,
25 manufacturing, distribution and possession and improper use

1 of controlled substances have a substantial and detrimental
2 effect on the health and general welfare of American
3 people."

4 BY MR. FARRELL:

5 **Q.** Mr. Zimmerman, do you agree with that statement?

6 **A.** Yes.

7 **Q.** Thank you. Mr. Zimmerman, do you agree with me that
8 the Controlled Substances Act, the law, the statute passed
9 by Congress in the Code of Federal Regulations where
10 Congress authorized the DEA to promulgate rules, these are
11 intended to close the system of distribution?

12 **A.** Correct.

13 **Q.** And the purpose of closing the system of distribution
14 is to prevent diversion?

15 **A.** Correct.

16 **Q.** And so, under this closed system that I'm going to
17 draw, the manufacturer of prescription opiates sells the
18 pills to the distributors, agreed?

19 **A.** Correct.

20 **Q.** And AmerisourceBergen, the party you are identified
21 with, is one of the distributors that purchases Schedule II
22 prescription opiates for sale to pharmacies across America?

23 **A.** Correct. One of the items we purchased was opioids,
24 correct.

25 **Q.** Another one of the distributors is McKesson, who is

1 also here. You're aware of that?

2 **A.** Yes.

3 **Q.** And another one is Cardinal Health? You're aware of
4 that?

5 **A.** Yes.

6 **Q.** Between the three of the companies, do you sometimes
7 refer to yourself internally as The Big Three?

8 **A.** It's referenced as The Big Three.

9 **Q.** How much of a market share does The Big Three hold
10 nationally?

11 **A.** I've heard upwards of 90%, but I don't know if that
12 still holds true today.

13 **Q.** All right. Now, from the distributors you sell to
14 pharmacies, correct?

15 **A.** Correct.

16 **Q.** And so, the patient has to go and take -- go to a
17 pharmacy to get these drugs; agreed?

18 **A.** Correct.

19 **Q.** And when I say "these drugs", I'm talking about
20 prescription opiates. They're only legally sold through
21 pharmacies.

22 MR. NICHOLAS: Objection.

23 THE COURT: What's the basis?

24 MR. NICHOLAS: I don't think it's an accurate
25 statement.

1 THE WITNESS: I mean, they're sold in -- I mean --

2 THE COURT: I'll let him answer if he knows.

3 MR. FARRELL: Your Honor, I will allow Mr.

4 Nicholas to --

5 MR. NICHOLAS: I'll withdraw it. I'll withdraw.

6 THE COURT: We don't need the smart-aleck remarks,

7 Mr. Farrell, and you can stop that right now.

8 MR. NICHOLAS: I'll withdraw the objection.

9 THE WITNESS: I was just going to say, we also
10 sell to hospitals in addition to -- I mean, you said they're
11 only sold to pharmacies, but we also sell opioids to
12 hospitals, as well.

13 BY MR. FARRELL:

14 **Q.** All right. And so, you have to have a prescription
15 from a medical doctor; agreed?

16 **A.** That's correct.

17 **Q.** All right. So, it's your position that the duties
18 imposed upon AmerisourceBergen are while the pills are in
19 your possession and end when you drop them off at the
20 pharmacy?

21 **A.** Correct.

22 **Q.** You don't believe you have any responsibility to
23 prevent diversion after you drop the pills off at the
24 pharmacy?

25 **A.** The closed -- I have no control over what happens -- so

1 the way they closed -- and let's just talk about the
2 recordkeeping requirements. If there's diversion in the
3 pipeline, the way the -- the way the CFR is written, they
4 can go to the manufacturer and the manufacturer says they
5 manufactured a thousand pills and I sold a thousand pills.
6 No diversion. They go to our -- we get audited every year,
7 multiple times a year, and they come to our warehouse and
8 say show me all the opioids you bought. They minus how much
9 we sold. They count the shelf and determine if any
10 diversion occurred while it's under our control.

11 They go to the pharmacy who has a DEA registration and
12 they can say how many drugs did -- how many opioids did you
13 get from the distributor? How many prescriptions did you
14 fill? And if it doesn't match, there could be diversion.

15 And so, you're asking me can I be responsible for a
16 pharmacy's recordkeeping requirements? We don't. We don't.
17 We don't -- that's why they issue a pharmacy a separate DEA
18 registration and that's why they have the authority to
19 revoke a registration or whatever action they can, is
20 because the diversion occurred under that registration.

21 If the diversion occurs under the distributor's
22 registration, they have the authority to take action against
23 our -- our registration.

24 **Q.** So, to be clear, your position on behalf of
25 AmerisourceBergen is that your duty is to receive

1 prescription opiates that you purchased from the
2 manufacturers and provide security for those until they're
3 delivered to the pharmacy and to ensure the pharmacy has a
4 DEA registration?

5 **A.** Our responsibility is, right, to keep -- receive those
6 drugs, safeguard them as outlined in the Code of Federal
7 Regulations to ensure no diversion occurs and then make them
8 available for pharmacies to order.

9 We also need to make sure that the pharmacies have an
10 appropriate license, that they submit the appropriate forms.
11 So, with a narcotic, it requires a narcotic order form or a
12 blank and we're required to make sure we get that
13 information, but the product doesn't leave until we are
14 satisfied.

15 **Q.** So, the answer to my question is yes, you believe from
16 AmerisourceBergen's perspective, that your duty or
17 responsibility ends once you drop off the pills to a
18 licensed DEA registrant pharmacy?

19 **A.** Our duty for diversion -- right. Correct. Our
20 responsibility to prevent diversion occurs under our
21 registration, correct.

22 **Q.** Do you believe that the DEA has a duty -- or, I'm
23 sorry, that ABC has a duty to maintain effective control
24 when considering the entire chain of distribution?

25 **A.** I have no control over the manufacturer. I can't --

1 you're imposing that we have a duty that they have effective
2 control as to how they box the product at the manufacturing
3 site. That's impossible. I -- we -- that's not how the --
4 that's not how the system was designed.

5 **Q.** So, let's take the manufacturers and let's remove them.
6 Let's just take once the pills get to you safely and
7 securely.

8 **A.** Correct.

9 **Q.** Do you have a duty to block shipment of suspicious
10 orders to pharmacies?

11 **A.** We have a duty to design and operate a system that
12 identifies suspicious orders and then we have a duty to
13 report those to the DEA.

14 **Q.** So, the answer to my question is yes or no? Do you
15 have a duty to block suspicious orders to pharmacies?

16 **A.** We -- we have a -- agreement that we won't ship orders
17 that we deem to be suspicious to pharmacies.

18 **Q.** Mr. Zimmerman, you are aware that you testified
19 previously in this case, in the opioid litigation; do you
20 recall that?

21 **A.** If I testified or I --

22 **Q.** You gave a deposition?

23 **A.** Yes, correct.

24 **Q.** In 2018?

25 **A.** Uh-huh.

1 Q. And you testified in your individual capacity and you
2 also testified as the 30(b) (6) deponent, did you not?

5 Q. I'm talking about the deposition that was taken in the
6 MDL 2804 related to this opiate litigation. A 30(b)(6)
7 notice was served on ABC. Are you aware of that?

8 **A.** Yes.

9 Q. Do you know what a 30(b)(6) is?

10 **A.** I'm representing the company, yes.

11 Q. And so, you were speaking on behalf of the -- of
12 AmerisourceBergen when you testified under oath in this
13 case?

14 **A.** For the 30(b)(6)?

15 Q. Yes.

16 | A. Yes.

17 Q. And you are asked whether or not AmerisourceBergen has
18 a duty to prevent diversion and your answer was no; do you
19 recall that?

20 | A. No.

21 Q. Let me pull up Clip 1.

22 (Recording played in open court)

23 BY MR. FARRELL:

24 Q. So, you -- your position officially on behalf of
25 AmerisourceBergen is you have no duty to maintain effective

1 controls as imposed under federal regulatory law?

2 MR. NICHOLAS: Your Honor, I'll object to the --
3 I'll object to the questioning that included a deposition
4 snippet that was not inconsistent with his testimony.

5 THE COURT: I'll sustain the objection.

6 BY MR. FARRELL:

7 Q. All right. So, how about the duty not to ship, do you
8 believe you have a duty not to ship?

9 A. I have -- we have an agreement not to ship.

10 Q. Sir, do you have a duty to block shipments of
11 prescription opiates?

12 MR. NICHOLAS: Objection, asked and answered.

13 THE COURT: Sustained.

14 MR. FARRELL: Well, Your Honor, if he's answered
15 it, I don't recall what his answer is.

16 THE COURT: Well, you're arguing with him. He's
17 answered your question. You didn't get the answer you
18 wanted. Let's move on.

19 BY MR. FARRELL:

20 Q. All right. So, you previously testified that
21 AmerisourceBergen as a company does not have a duty to block
22 shipments; agreed?

23 A. If you're referring to that video, we are talking about
24 the word duty, not whether -- and it was a discussion -- it
25 was a long discussion about that and -- as I remember it

1 from three years ago.

2 Q. So, we're moving past the duty to maintain effective
3 control. We're now talking about the duty to block -- to
4 block suspicious orders. That's a separate topic. Do you
5 recall testifying about that?

6 MR. NICHOLAS: I'll object to the -- I'll object
7 to the question as just confusing and I think at this point
8 -- I just think it's very confusing.

9 THE COURT: I'll sustain the objection.

10 BY MR. FARRELL:

11 Q. So let me start over. Is the official position of
12 AmerisourceBergen that it has a duty to block shipment of
13 suspicious orders?

14 MR. NICHOLAS: Objection, asked and answered.

15 THE COURT: Sustained.

16 MR. FARRELL: Well, Judge, can I impeach him with
17 the testimony from his previous deposition?

18 THE COURT: You just did, didn't you?

19 MR. FARRELL: This is a second topic. This is the
20 duty to block shipment.

21 THE COURT: Well, if he testified inconsistently
22 with what he just said, you may impeach him.

23 MR. FARRELL: Yes, sir.

24 Can you play video clip 2, please?

25 (Recording played in open court)

1 BY MR. FARRELL:

2 Q. So, that's 2018. You were unfamiliar with the shipping
3 requirement from the Masters Pharmaceutical case; agreed?

4 MR. NICHOLAS: I'll object to the question. I
5 don't believe that the testimony that was shown was
6 inconsistent with his testimony.

7 THE COURT: Sustained. I don't think it was
8 either.

9 BY MR. FARRELL:

10 Q. Mr. Zimmerman, have you gone back to look at -- look
11 backwards and to determine the -- AmerisourceBergen's role
12 in shipping suspicious orders or otherwise into
13 Huntington-Cabell County?

14 A. Our department has looked at -- have I personally?

15 Q. Yes.

16 A. No.

17 Q. All right. You're aware that this case has been
18 pending for four years?

19 A. I don't -- okay. I don't know that for sure, but if
20 you're saying that, then I don't have any reason to not know
21 that or I don't -- I don't know how long it's been. Let me
22 answer it that way.

23 Q. You understand that there are a number of counties and
24 cities across America that have filed lawsuits?

25 A. Yes.

1 **Q.** And you've testified on behalf of AmerisourceBergen in
2 that case?

3 **A.** Yes.

4 **Q.** Okay.

5 **A.** And -- yes.

6 **Q.** Have you read any of the other deposition transcripts
7 from this case?

8 **A.** Mine or other people's or --

9 **Q.** Any of the other ones?

10 **A.** No.

11 **Q.** Have you gone back and read the discovery responses
12 from AmerisourceBergen regarding the Suspicious Order
13 Policy?

14 **A.** I have not.

15 **Q.** Have you read any of the deposition transcripts from
16 the people from Huntington and Cabell County that have been
17 deposed by AmerisourceBergen in this case?

18 **A.** I have not.

19 **Q.** You have complained in the past that the DEA has not
20 done a very effective job of communicating with you at
21 AmerisourceBergen about your duties under federal
22 regulations; agreed?

23 **A.** I wouldn't characterize it that way. I would state
24 that I had wished that the communications were better with
25 DEA.

1 **Q.** Why is that?

2 **A.** When I started with the company 30 years ago, we had a
3 great working relationship with the DEA. We worked together
4 on a lot of different issues when I first started. Steroids
5 was the big thing, roid rage. We worked with DEA. They
6 made it a Schedule III and we were able to -- you know, that
7 was very positive movement.

8 The Methamphetamine Control Act was another one. I
9 worked with DEA giving them Pseudoephedrine Sales Reports
10 years in advance so they could see where they had pockets of
11 areas. Since pseudoephedrine tablets were an
12 over-the-counter drug, DEA had no access to that
13 information, so we cooperated with them to then help launch
14 into the Methamphetamine Control Act that passed that had a
15 big impact on the methamphetamine problem in the U. S.

16 We've worked with them on other issues, whether it's
17 train their DEA officers or diversion investigators to help
18 them understand the distribution network. We've worked with
19 them on that.

20 They had an issue with Methadone in hospitals causing
21 overdose. They had us come down and asked if we could
22 voluntarily stop selling Methadone diskettes to pharmacies,
23 which all the distributors agreed upon and we were able to
24 resolve that.

25 So, when we worked together, we were able to resolve

1 issues. Over the years, opioid crisis happens, and it just
2 seems like there's been a breakdown. The crisis continues.
3 No communication. No resolution. So, it's frustrating.

4 **Q.** So, in fact, you served on the 1998 Attorney General
5 Methamphetamine Act Panel, correct?

6 **A.** The wholesalers were only given one member and I wasn't
7 that one. I worked with them, but I wasn't the one. I
8 think I was -- I was -- they had a more senior person at the
9 time in the 90s than I, but I sat in on the meetings and
10 participated.

11 **Q.** We call that the Reno Report colloquy. Do you know
12 what that means?

13 **A.** Yeah. Janet Reno was leading it up.

14 **Q.** And you've testified about that before. You're
15 familiar with the Reno Report?

16 **A.** I -- I don't know if I've seen it for decades, but
17 yeah.

18 **Q.** All right. So, you're aware that, in this case, the
19 DEA has been deposed several times?

20 **A.** I'm not aware of that.

21 **Q.** Did you know that the DEA actually put up a 30(b) (6)
22 witness over a three-day period by the name of Thomas
23 Prevosnik?

24 **A.** If you're -- if you're telling me that, yes. I know
25 Tom, but --

1 **Q.** Have you read the deposition transcript of Thomas
2 Prevosnick to learn what the DEA says about the opioid
3 epidemic?

4 MR. NICHOLAS: Your Honor, I will object. I'm
5 trying not to object too often, but he said he doesn't know
6 anything about any other depositions and said he didn't read
7 anything, didn't know any DEA people were deposed. So, I
8 don't think this line of questioning is fruitful and I think
9 it's irrelevant.

10 THE COURT: Have you read the deposition
11 transcript of Thomas Prevoznik?

12 THE WITNESS: I have not.

13 THE COURT: I'll sustain the objection.

14 BY MR. FARRELL:

15 **Q.** All right. Have you read the deposition transcript of
16 any of the other DEA agents, including Joe Rannazzisi,
17 Demetra Ashley, Laurie Costello (phonetic), Stacy
18 Harper-Avilla, June Howard, Michael Mapes, Keith Martin,
19 Matt Strait, Don Tush, or Kyle Wright?

20 **A.** I have not.

21 **Q.** Have you read the complaint that was filed in this
22 matter?

23 THE COURT: I think the court reporter needs a
24 break, Mr. Farrell. Let's -- it's quarter after 3:00.
25 Let's be in recess until 3:30.

1 (Recess taken)

2 THE COURT: Mr. Zimmerman, you're still under oath
3 of course, sir. You may resume the witness stand.

4 THE WITNESS: Thank you.

5 THE COURT: Go ahead, Mr. Farrell.

6 BY MR. FARRELL:

7 Q. Mr. Zimmerman, you're familiar with the controlled
8 substance ratio and the function it was used for by
9 CSRA?

A. I'm not sure exactly what you're referring to.

11 Q. When looking for suspicious orders, does CSRA look to
12 the percentage of product sold to a pharmacy compared to
13 controlled substances?

A. It's one of the many elements that they, they consider.

15 Q. So the answer is, yes, it's a component?

16 A. Yes.

17 Q. Okay. Would you agree with me that the average retail
18 pharmacy purchases between 5 and 15 percent of controlled
19 substances from your distribution centers?

20 **A.** I, I'm not sure what the average is from our
21 distribution centers, but I've seen reference to 10, 12, 15.

22 Q. I've got a couple questions for you in general about
23 the opioid epidemic.

24 Mr. Zimmerman, do you acknowledge that there presently
25 exists an opioid epidemic in the United States?

1 | A. Yes.

2 Q. Do you acknowledge there presently exists an opioid
3 epidemic in the State of West Virginia?

4 A. Yes.

5 Q. Do you acknowledge there presently exists an opioid
6 epidemic in Huntington, Cabell County?

7 **A.** I -- again, I don't know that specific, but I know West
8 Virginia for sure, yes.

9 Q. You're unfamiliar with the circumstances of the opioid
10 epidemic within Huntington/Cabell County?

11 **A.** There's an opiate epidemic in West Virginia. I'm not
12 sure if you want me to say city but city or --

13 Q. Well, I'm referencing the plaintiffs in this case.

14 **A.** Yes.

15 Q. The city -- sorry. The City of Huntington and Cabell
16 County, do you acknowledge there's an opioid epidemic within
17 the city and county?

18 | A. Yes.

19 Q. Do you acknowledge that the opioid epidemic has had a
20 devastating impact on public health and public safety?

21 **A.** I believe so.

22 Q. Do you acknowledge the opioid epidemic involves opioid
23 use and abuse?

24 **A.** Yes.

Q. Do you acknowledge the opioid epidemic involves

1 morbidity?

2 **A.** Death?

3 MR. NICHOLAS: I'll object to that. I'm not sure
4 what is meant by that.

5 THE COURT: Yeah. What do you mean by morbidity,
6 Mr. Farrell, in this context?

7 BY MR. FARRELL:

8 **Q.** Mr. Zimmerman, do you know what morbidity means?

9 **A.** I was going to ask you. Are you referring to death?

10 **Q.** That would be mortality. I'm asking you if you know
11 whether morbidity or impact to a person's health.

12 **A.** I'm not still understanding the, your question.

13 **Q.** Do you believe the opioid epidemic has had adverse
14 impacts on individuals' well-being, physical well-being in
15 Huntington, Cabell County, West Virginia?

16 **A.** That were, that were addicted? Is that your question?

17 **Q.** I'm asking you whether or not you believe the opioid
18 epidemic has had an adverse effect on the physical
19 well-being of human beings that live in Huntington and
20 Cabell County, West Virginia.

21 **A.** It would have an effect, yes.

22 **Q.** Do you believe the opioid epidemic has had -- involves
23 more -- let me strike that and start over. Do you believe
24 the opioid epidemic involves mortality in Huntington, Cabell
25 County, West Virginia?

1 **A.** Yes.

2 **Q.** Do you acknowledge that the DEA has warned
3 AmerisourceBergen about the risks of selling too many pills
4 of prescription opiates into communities?

5 MR. NICHOLAS: Objection for lack of foundation.

6 THE COURT: Yeah. I'll sustain the objection.

7 You can go at it another way, Mr. Farrell, if you can.

8 But --

9 BY MR. FARRELL:

10 **Q.** Are you aware of whether or not the DEA has warned
11 AmerisourceBergen of the risks of selling too many
12 prescription opiates into communities?

13 MR. NICHOLAS: Same objection.

14 THE COURT: Well, if he knows.

15 THE WITNESS: I'm not sure of the con- -- I'm not
16 sure of the context of your question.

17 BY MR. FARRELL:

18 **Q.** It's fair. We'll come back to that shortly.

19 Has the DEA sanctioned AmerisourceBergen for failing to
20 maintain effective control to prevent diversion of
21 prescription opioids?

22 **A.** I'm not sure how to answer that. We have entered into
23 an agreement with DEA, but there's no guilt identified. I'm
24 not sure how to answer your question.

25 **Q.** Did the agreement include a sanction?

1 MR. NICHOLAS: Object to the form.

2 THE COURT: Overruled. You can answer.

3 THE WITNESS: What do you mean by sanction?

4 BY MR. FARRELL:

5 **Q.** Do you know what a sanction is?

6 **A.** No. I'm not sure what -- if you could just tell me
7 what you -- I just want to make sure I answer, answer your
8 question correctly.

9 **Q.** Mr. Zimmerman, to be fair, I'm not going to -- I'm
10 going to show you the documents. I'm just trying to
11 understand before we start on the documents what your
12 general understanding is.

13 You're aware AmerisourceBergen -- in fact, you
14 personally negotiated an agreement with the DEA back in
15 2007?

16 **A.** Yes, correct.

17 **Q.** And as part of that agreement, your distribution center
18 got its license reinstated. Agreed?

19 **A.** Correct.

20 **Q.** And you got the license reinstated when two things
21 happened. Number one is you agreed to modify how you were
22 reporting suspicious orders. Agreed?

23 **A.** Fair.

24 **Q.** Instead of reporting the suspicious orders like
25 everybody else in the country to the local distribution

1 center, AmerisourceBergen was required to report suspicious
2 orders to headquarters?

3 **A.** That was one element, uh-huh.

4 **Q.** That's a change -- that's different than what anybody
5 else was doing; correct?

6 **A.** Correct.

7 **Q.** In addition to that, AmerisourceBergen made promises or
8 pledges to implement new policies and procedures. Agreed?

9 **A.** We changed our processes and procedures, yes.

10 **Q.** Mr. Zimmerman, I didn't ask you if you changed them.

11 I'm asking you whether or not as part of your negotiations
12 with the Drug Enforcement Agency following the Immediate
13 Suspension Order you entered into an agreement, you
14 negotiated a deal to get your license back by making
15 promises that you would make changes?

16 **A.** Correct.

17 **Q.** Do you acknowledge that the more prescription opioid
18 pills that you sell into the community, the more likely
19 diversion is to take place?

20 **A.** I, I don't know that. I mean, we sell, we sell to
21 licensed pharmacies. Right? And then the amount of product
22 that goes to those pharmacies because they receive more,
23 does that mean they're more susceptible to diversion? I
24 guess they could be.

25 **Q.** Is that a factor you take into account as CSRA?

1 **A.** The size of the pharmacy?

2 **Q.** Size of the volume of shipments.

3 **A.** We look at that, yes.

4 **Q.** So the reason that you're looking at it is what?

5 **A.** We're looking for anything that would raise our
6 suspicion of -- totality of, of items that we look at. I
7 mean, there's all sorts of things that we take a look at.

8 **Q.** You're looking for suspicion of what?

9 **A.** Could be a potential suspicious order.

10 **Q.** And it's suspicious why?

11 **A.** It could be -- you know, the Code of Federal
12 Regulations says it could be quantity, pattern, or frequency
13 is the way it's stated in the CFR. But we're looking at
14 anything that we feel to be -- makes it a suspicious order.

15 **Q.** Suspicious --

16 **A.** The totality of the circumstances.

17 **Q.** Suspicious of what? What is it that you're suspicious
18 of?

19 **A.** We're suspicious it's a larger order going to a
20 pharmacy and we don't have -- we just don't feel comfortable
21 about shipping that product.

22 **Q.** Why is that a bad thing?

23 **A.** It's just the process that we, that we operate under.
24 We have no specific information on the patient or the
25 prescriber or those individuals. So we have to go with the

1 information that we have. If they're a licensed pharmacy,
2 we report those orders to DEA. And then we have an
3 obligation to review orders to see if there's again -- that
4 we identify as suspicious but report to the DEA.

5 **Q.** Mr. Zimmerman, I think we're talking past each other.

6 **A.** Okay. Sorry.

7 **Q.** You're suspicious that it's too, too big? Are you
8 suspicious that the pills are being -- what? Help me
9 understand what you're suspicious of. Why are suspicious
10 orders bad?

11 MR. NICHOLAS: I'll object to the -- I'll object
12 to the question.

13 THE COURT: On what basis?

14 MR. NICHOLAS: It's, it's confusing and it's
15 vague. It's just not specific enough.

16 THE COURT: Well, I'll overrule the objection.

17 Can you explain why suspicious orders are bad, if they
18 are?

19 THE WITNESS: I don't know they're bad. They're
20 suspicious. That's the purpose of -- that's the purpose of
21 reporting them. Pharmacies are licensed and they fill
22 prescriptions. We believe that the DEA, the Board of
23 Pharmacy would not issue a registration to a pharmacy that
24 wasn't meeting the requirements.

25 If we have an order that we feel may be suspicious just

1 because it seems suspicious doesn't mean it's bad. We
2 report it to the DEA and all issues, then the DEA would then
3 investigate. If your concept is all suspicious orders are
4 bad, then DEA should be taking action on every single
5 suspicious order reported. And I, I'm not sure if I can
6 recall one.

7 So I'm just -- I don't know if I can say that a
8 suspicious order is bad. Suspicious orders are suspicious.
9 That's the reason they put it in the Code of Federal
10 Regulations so we had a mechanism to alert DEA of the
11 potential suspicion that if they had other information at
12 their disposal, they can investigate and take action on the
13 pharmacy to see if there's diversion occurring at the
14 pharmacy. That's the whole purpose of the suspicious order,
15 not that -- it doesn't say report bad orders. It says
16 report suspicious orders. So I can't make that nexus.

17 BY MR. FARRELL:

18 **Q.** So I guess my question to you, Mr. Zimmerman, to be
19 more direct, is that what you're suspicious of is that
20 the prescription opiates are getting diverted into the
21 illicit market. Would you agree with that?

22 **A.** Well, what's suspicious of the -- whatever made it
23 suspicious on the totality of the review of the order of why
24 the investigator decided to report it to DEA is that they
25 just didn't feel comfortable releasing that order and they

1 would report to DEA.

2 And, again, the way the system works is the DEA has a
3 lot more information. They see who that pharmacy is buying
4 from in addition to AmerisourceBergen. They have records --
5 they have investigative techniques at their disposal which
6 we don't have. And we're, we're a company. We're not an
7 enforcement agency and we're not a regulatory agency.

8 Our regulatory requirement is to report a suspicious
9 order so then the authorities that have that jurisdiction
10 can then conduct that part. And if there are bad actors,
11 then they can revoke the license and that tells us not to
12 ship to them anymore.

13 **Q.** Let's try this a different way.

14 Can you, can you bring up the five questions?

15 MR. FARRELL: Judge, may I approach the screen?

16 THE COURT: Yes.

17 BY MR. FARRELL:

18 **Q.** I'm going to ask you five questions, Mr. Zimmerman,
19 and I ask that you answer them with an affirmative and
20 negative and then you can explain all you want. Okay?

21 **A.** Okay.

22 **Q.** Question Number 1: Does AmerisourceBergen take the
23 position that the purpose of the Controlled Substances Act
24 and its federal regulations is to prevent diversion? Yes or
25 no?

1 MR. NICHOLAS: Your Honor, I will object to the
2 format of the question, both the display and the yes/no box.
3 I recognize that the witness is on -- is being treated as an
4 adverse witness, but this is a bit much and I, I don't think
5 this is an appropriate way to ask questions in this context.

6 THE COURT: Well, I'm going to overrule the
7 objection and let him answer.

8 Go ahead, Mr. Farrell.

9 BY MR. FARRELL:

10 **Q.** Does AmerisourceBergen take the position that the
11 purpose of the Controlled Substances Act and its federal
12 regulations is to prevent diversion?

13 **A.** That's one, correct.

14 **Q.** Does AmerisourceBergen agree that diversion is
15 foreseeable if registrants fail to comply with federal law?

16 MR. NICHOLAS: Object to the question.

17 THE COURT: Well, it's a loaded question, isn't it
18 Mr. Farrell?

19 MR. FARRELL: Judge, I'll represent to you that
20 all five questions were asked of the DEA 30(b) (6) witness.
21 And I think it would be probative to be able to compare and
22 contrast the positions taken by AmerisourceBergen and the
23 positions taken by the United States Drug Enforcement
24 Agency.

25 THE COURT: All right. I'll let him --

1 Do you have something else to say?

2 MR. NICHOLAS: Well, if, if --

3 THE COURT: I'm going to let him answer. I'm not
4 sure how helpful this is but, Mr. Zimmerman, go ahead and
5 answer if you can.

6 THE WITNESS: What part of federal law? I mean,
7 I'm just curious. There's a lot of federal law.

8 BY MR. FARRELL:

9 **Q.** We'll start with the Controlled Substances Act.

10 **A.** So, no. It depends, it depends on -- so you can't just
11 ask open-ended. So one of the requirements of a cage is
12 your bolts, your cage bolts need to be welded to the floor.

13 If you don't weld the cage bolt -- it's in the C.F.R.
14 If you don't weld the cage bolt, is it foreseeable that
15 there's going to be diversion. I don't think so.

16 So it depends on what aspect or technicality you're
17 referring to. I don't -- so some, yes, right. If I'm
18 shipping to somebody that doesn't have a license, yes, it's
19 foreseeable that diversion would be occurring. If I don't
20 weld -- if I only weld three of my bolts instead of four on
21 my cage to the floor, I don't think diversion is foreseeable
22 in that case.

23 BY MR. FARRELL:

24 **Q.** Well, let's take, for example, selling a couple
25 million pills to SafeScript Pharmacy. If you don't

1 maintain effective control according to federal law, is
2 diversion foreseeable?

3 **A.** Not under our registration it's not. We didn't have
4 diversion from our warehouse I don't believe.

5 **Q.** If you fail to comply with federal law, more diversion
6 happens. Do you agree with that?

7 **A.** I guess you're just looking -- it says -- failure to
8 comply to every regulation? One regulation? I mean, a yes
9 or no question to a multitude of requirements?

10 **Q.** I had you read aloud the purpose of the Controlled
11 Substances Act was to prevent diversion. Agreed?

12 **A.** Correct.

13 **Q.** And, so, what I'm asking you is if you don't follow the
14 laws of the Controlled Substances Act, the foreseeable
15 result is diversion. Agreed?

16 MR. NICHOLAS: Your Honor, I'm sorry to interrupt.
17 I hate to keep objecting. I don't want to. But I do
18 object.

19 THE COURT: I'm going to sustain the objection to
20 that. The "yes" or "no" format doesn't embrace the universe
21 of possible, possibilities. And I think the witness's
22 answer to the last question illustrated that. So I'm going
23 to sustain the objection.

24 BY MR. FARRELL:

25 **Q.** How about if I skip just to the last question and

1 ask you directly. Do you agree that the more pills a
2 distributor ships unlawfully into a community results in
3 more diversion into the illicit market?

4 MS. MAINIGI: Objection, Your Honor, calls for a
5 legal conclusion.

6 THE COURT: Yeah. How would he know? Sustained.

7 MR. FARRELL: Judge, this is the elements of
8 causation that the DEA is --

9 THE COURT: Well, I understand that, Mr. Farrell,
10 but you're loading the, the gun against him here in a way
11 that appears to me to be unfair because the "yes" or "no"
12 format doesn't embrace all of the possibilities of the
13 answer. And --

14 MR. FARRELL: That's fair. Yes, sir.

15 THE COURT: I'm going to sustain the objection.

16 MR. FARRELL: Will you take it down, please.

17 BY MR. FARRELL:

18 Q. Let's talk briefly about your policies and
19 procedures. You would -- you said something earlier,
20 and I forget the exact words, that your CSRA -- your
21 policies and procedures were -- was it a corporate
22 responsibility?

23 A. We have CSRA policy. I assume that's what you're
24 referring to, CSRA policy and procedures.

25 Q. So your CSR policies and procedures relating to

1 diversion control, do they apply to all of your distribution
2 centers?

3 **A.** So we have -- I'd have to see the policies and
4 procedures because some are strictly for the distribution
5 center because of the function, and then some are corporate.
6 So it depends on the policy you're referring to.

7 **Q.** All right. So if we talk about in general suspicious
8 orders, identifying suspicious orders, or monitoring -- you
9 agree with me that AmerisourceBergen has an obligation to,
10 to design and operate a system to identify suspicious
11 orders?

12 **A.** Yes.

13 **Q.** And that system that you have put in place applies
14 equally to all distribution centers?

15 **A.** Yes. It --

16 **Q.** And, so, your -- what we call it is SOMS, S-O-M-S.
17 Correct?

18 **A.** Okay.

19 **Q.** I'm asking you, do you have a different understanding
20 of -- do you know what the word SOMS means?

21 **A.** I'm just trying to figure out what you're getting at.
22 So we have policies and procedures that we train our
23 diversion people that work in the cage involve. They see a
24 suspicious order, they have an obligation to report it.

25 That's over and completely different than the automated

1 suspicious order reporting process. So, it's a two-step
2 process. I'm just trying to understand which one -- are we
3 talking about the manual process of the distribution centers
4 which would be in all the distribution centers or the
5 corporate one which is managed at the corporate level which
6 is more of the due diligence and order reviewing on an
7 electronic scale?

8 **Q.** That one, the latter one. What, what shall we call
9 that?

10 **A.** The Order Monitoring Program.

11 **Q.** Okay. We'll call it the OMP?

12 **A.** Yeah.

13 **Q.** Is that OMP policy applicable nationwide?

14 **A.** Yes.

15 **Q.** Okay. Would you call it then systemic, meaning it's a
16 system, it's a process that applies across the country?

17 **A.** It's a program, yeah.

18 **Q.** So to the extent that your OMP program is effective in
19 preventing control, do you believe that your successes are
20 systemic?

21 **A.** Our successes?

22 MR. NICHOLAS: I'll object to the form, or
23 whatever. I mean, I'll object to the question, but I will
24 add that it would probably be helpful to have some of these
25 questions put into a time frame.

THE COURT: Sustained.

2 BY MR. FARRELL:

3 Q. During the time frame that you were disclosed as a
4 30(b)(6) witness -- I believe it's 2006 to 2014 -- are
5 you familiar with the OMP program being operated by
6 AmerisourceBergen?

7 **A.** Yes.

8 Q. Do you believe it was effective?

9 **A.** Yes.

10 Q. Do you believe it was effective nationwide?

11 **A.** You said '06 to '14?

12 Q. Yes.

A. The program changed in '07.

14 Q. So we'll say from '07 to '14 do you believe your
15 program was effective?

16 | A. Yes.

17 Q. Do you believe it was effective in '06?

18 | A. Yes.

19 Q. So let's back up. Between 2006 and 2014 do you believe
20 your OMP program was effective?

21 **A.** Yes. I think we've had an OMP program since I started
22 in 1990. And I think it met all the federal requirements
23 and has been effective.

24 Q. Okay. So it was effective at preventing diversion?

25 A. From our -- under our, under our control, yes.

1 **Q.** Under your definition of, of diversion, it was
2 effective?

3 **A.** It met all of our requirements, correct.

4 **Q.** And to the extent that there are problems with your
5 OMP, those problems are nationwide as well. Do you follow
6 me? If you're wrong and there's some problem with your OMP
7 system, program, that's a problem that we'll see across
8 distribution centers?

9 **A.** I would --

10 MR. NICHOLAS: Objection. I will object to
11 foundation and relevance.

12 THE COURT: Sustained. I don't see -- well, I'll
13 sustain the objection.

14 BY MR. FARRELL:

15 **Q.** Were your OMP policies -- I'm sorry. Strike that.
16 Was your OMP, Order Monitoring Program, were its
17 practices and policies national in scope?

18 **A.** Yes. We're talking about the corporate -- we're
19 talking about the corporate one, not the -- they both were,
20 but just different policies, yes.

21 **Q.** Mr. Zimmerman, the position that you're taking with
22 regard to your duties under your -- in your OMP, you, you
23 are aware that the DEA has disagreed with your position on
24 federal regulatory law?

25 **A.** On what aspect?

1 **Q.** I'm asking you.

2 **A.** Oh, I'm sorry. No.

3 **Q.** Are you aware of whether or not the DEA disagrees with
4 you?

5 **A.** I don't know that. I don't know what portion you're
6 talking about.

7 **Q.** Let's start with the duty to maintain effective control
8 and limit it to while the product is in your possession. Do
9 you understand the DEA has told AmerisourceBergen that it
10 believes its duty goes beyond that?

11 THE COURT: You've already asked him all this, Mr.
12 Farrell.

13 MR. FARRELL: Well, I'm going to get ready to go
14 into the actual DEA letters, the registrant letters, the
15 Immediate Suspension Order, the settlement agreement, the
16 letters between, between this witness and others. So I'm
17 just trying to understand whether or not he is --

18 THE COURT: You asked him the question that you
19 asked him a while ago that he's already answered. That's
20 all I have to say.

21 MR. NICHOLAS: That's about all I have to say,
22 too. I guess if we have, if we have something to show the
23 witness or ask him about, it would be good to just get to
24 that at this point.

25 MR. FARRELL: I thought I was getting there by

1 asking a foundation question.

2 THE COURT: Well, go ahead.

3 BY MR. FARRELL:

4 Q. Are you aware of whether or not the DEA agrees with
5 your interpretation of the responsibility to maintain
6 effective control? Is that in your knowledge base?

7 A. In my -- I believe we have the same understanding that
8 we have, we have to maintain effective controls to prevent
9 diversion. And they issue a DEA registration to each
10 segment with those same requirements.

11 If you're asking me do I think that our -- we're
12 responsible for a pharmacy or doctors prescribing it under
13 their DEA registration, no, we're not. And if they, they
14 think we do, then I disagree with them.

15 Q. Mr. Zimmerman, I'm not asking you that. I'm asking you
16 very simply, do you know whether or not the DEA agrees with
17 your interpretation of your duties under federal law?

18 A. And I said "no."

19 Q. While we're pulling up the first, the first exhibit, I
20 have a couple questions for you.

21 There was reference made earlier -- when you're
22 designing -- when you're doing your due diligence, when
23 you're looking into it, do you consider patient population
24 around a pharmacy when you're determining a suspicious
25 order?

1 **A.** It, it depends on the time frame. Our program has
2 evolved over time.

3 Q. Okay. So my understanding is that you --
4 AmerisourceBergen basically had three evolutions of its OMP
5 program. Is that fair?

6 **A.** It's three larger evolutions. It's continually
7 evolved, if not daily. So, you know, we add things as we
8 find more information. That works. They keep adding.

9 **Q.** My understanding is that you had one version of OMP
10 that was in existence up until about 2007?

11 A. Correct.

12 Q. And then from 2007 to approximately 2014 there was
13 another iteration of your OMP?

14 A. Correct.

15 Q. And then from 2015 to the present is the third
16 evolution of the OMP?

17 **A.** Those are the major ones, but it's evolved, you know,
18 someday, not major overhauls. I would consider those
19 significant changes.

8. So are you aware of when Oxycontin was launched?

A. Oxycontin?

22 O. Oxycontin.

A. I don't know when it was originally launched.

24 Q. Do you know what Oxycontin is?

25 **A.** Yes, yes.

1 **Q.** And did AmerisourceBergen sell Oxycontin?

2 **A.** Yes.

3 **Q.** So I'll represent to you that it was sometime around
4 1996 that the FDA approved it. Are you aware from CSRA of
5 any abuse or use of Oxycontin that is problematic in
6 America?

7 MR. NICHOLAS: Objection, foundation. It's just a
8 super broad question, Your Honor. I'll object to it.

9 THE COURT: Overruled.

10 Answer it if you can, Mr. Zimmerman.

11 THE WITNESS: Today or in -- I mean, what time
12 frame?

13 BY MR. FARRELL:

14 **Q.** Any time frame.

15 **A.** Yes.

16 **Q.** Are you aware of whether Oxycontin is being used and
17 abused in America?

18 **A.** I was aware, yes.

19 **Q.** Okay. When did you become aware of that?

20 **A.** I don't know the day and year but, I mean, I know it
21 became -- it was an issue of abuse, the immediate release --
22 or not the immediate release but the time-release Oxycontin
23 became a problem. I don't know what year it was, but it was
24 after it was released of course.

25 **Q.** Are you aware of the Congressional hearings in 2001 on

1 Oxycontin use and abuse?

2 **A.** I'm sure I was, but I can't think of it.

3 **Q.** So this is about the time that you became the Vice
4 President of Corporate Security and Regulatory Affairs at
5 the newly formed AmerisourceBergen; correct?

6 **A.** 2001, correct.

7 **Q.** And, so, do you have any recollection of following at
8 that time the Congressional reports about Oxycontin use and
9 abuse?

10 **A.** I don't recall.

11 **Q.** Are you familiar with the Distributor Initiative in the
12 meetings with the DEA in 2005?

13 **A.** Yes.

14 MR. FARRELL: Judge, may I approach?

15 BY MR. FARRELL:

16 **Q.** I'm going to show you what has been marked as
17 P-9112 and we have copies circulating to counsel. And
18 I'm going to put a flag down here in 2005. Have you
19 seen this document before?

20 **A.** I've seen it looking through documents but I -- not,
21 not before just the other day.

22 **Q.** Well, you testified about this two years ago in 2018,
23 did you not?

24 **A.** I -- maybe -- I'm confused. The top memorandum is from
25 DEA to DEA. I've never seen that memo before just the other

1 day. Are you talking about the presentation? I've seen
2 that. I testified to the presentation. But I have never
3 seen the --

4 **Q.** Take the, take the cover memo and put it to the side.
5 Let's talk about the presentation. You've seen this
6 presentation before; correct?

7 **A.** I have seen the -- I wasn't at the presentation with
8 the DEA, but I've seen the presentation, correct.

9 **Q.** Who gave it to you?

10 **A.** Steve Mays.

11 **Q.** Do you know when he gave it to you?

12 **A.** I believe when he came back from the meeting.

13 **Q.** Okay. Did you know about the meeting beforehand?

14 **A.** I don't -- I, I would have. I mean, he reported to me,
15 so I would have, but I don't recall in my head.

16 **Q.** I'm not being pejorative, but you're the head of CSRA?

17 **A.** Yes.

18 **Q.** And the DEA has called a meeting to talk about
19 diversion of prescription opioids and you did not attend it.
20 Was there -- do you recall whether or not you had other
21 obligations or there was some reason you weren't there?

22 **A.** I don't recall that.

23 **Q.** But Steve Mays was there on behalf of
24 AmerisourceBergen; correct?

25 **A.** Yes. And it could have been that he was the one that

1 the DEA contacted to come to the meeting. I, I don't
2 remember the mechanics of it.

3 MR. FARRELL: Judge, P-9112 is a document that is
4 referenced as an exhibit for the deposition of Thomas
5 Prevoznik that has been submitted to you.

6 What I will do is I will remove the front page that --
7 which is Bates stamped 0001 and 0002. And I would ask for
8 the admission of P-9112a which will be just the pages Bates
9 stamped 0003 through 0018.

10 THE COURT: Any objection to this? Do you want it
11 admitted?

12 MR. FARRELL: Yes, sir.

13 THE COURT: Any objection?

14 MR. NICHOLAS: Could we hear a little bit more
15 about it before, before it's admitted?

16 THE COURT: Well, it's -- he said he knew about
17 the meeting and he knew one of his people went. But that
18 doesn't -- it doesn't seem to me that that sufficiently
19 identifies the exhibit to make it admissible. And it's
20 probably got all kinds of hearsay in it.

21 BY MR. FARRELL:

22 Q. So let's start with just the examination of it.
23 Can you, can you bring up -- we're going to go through
24 some of the slides. Okay, Mr. Zimmerman?

25 A. Yeah.

1 **Q.** Can you go to Page 2 on the slide that is Bates stamped
2 Page 4. Go to the next page, please. I think you can back
3 up one, "Issues to Consider."

4 So you see at the bottom right-hand corner US-DEA Bates
5 stamp 150, Mr. Zimmerman?

6 **A.** Yeah.

7 **Q.** And then this is actually P-9112 and we'll designate it
8 little a for the time being, Page 4. Will you read what it
9 says up above, "Issues to Consider."

10 **A.** Want me to read it out loud?

11 **Q.** Sure.

12 **A.** "Frequency of orders, size of orders, range of products
13 purchased, payment method, pharmacy location, percent
14 controlled versus non-controlled, customer pick-up at
15 distributor."

16 **Q.** Okay. So are you aware that the DEA, at least as of
17 2005, was advising AmerisourceBergen that you had issues to
18 consider beyond just the frequency and size of orders, but
19 that you needed to look into payment method, the pharmacy
20 location, percent versus -- controlled versus percent
21 non-controlled, and whether or not the customers were
22 picking up at the distributors? Were you aware of this?

23 **A.** I mean, it's on the slide. I mean --

24 **Q.** I'm not asking you if it's on the slide. I'm asking
25 you whether in 2005 you were aware that the DEA was so

1 advising AmerisourceBergen.

2 **A.** They did it in -- through the presentation in the
3 meeting with Steve. They did this presentation, correct.

4 **Q.** The bottom portion of the slide says DEA distributor
5 registrations. Would you please read the section below, the
6 last bullet point?

7 **A.** "Maintenance of effective controls against diversion of
8 particular controlled substances into other than legitimate
9 medical channels."

10 **Q.** Were you aware that the DEA was advising
11 AmerisourceBergen in 2005 that your registration was
12 dependent upon maintaining effective controls against
13 diversion?

14 **A.** And the illegitimate medical channels like unlicensed
15 pharmacies, that's correct.

16 **Q.** Go to the next slide. Do you see up here it says
17 Supreme Court case, *Direct Sales vs. United States*, 1943?
18 Do you see that?

19 **A.** I do.

20 **Q.** All right. Did the DEA tell CSRA to be aware of the
21 *Direct Sales* case from 1943 during the distributor meeting
22 with them in 2005?

23 **A.** It's on the slide, so it would have -- again, you're
24 asking me if they covered that. I wasn't at the meeting.

25 **Q.** Okay. Did Mr. Mays come and tell you about the

1 meeting?

2 **A.** Yes.

3 **Q.** So you, the head of CSRA, had this in your hand and you
4 knew it came from the DEA; correct?

5 **A.** Yes.

6 **Q.** You were on notice that the DEA in 2005 was citing this
7 case from 1943 in a private meeting with AmerisourceBergen's
8 CSRAs; correct?

9 **A.** Yes.

10 **Q.** And are you familiar with the holding of this case and
11 the meaning of citing this case in this document?

12 **A.** I don't.

13 **Q.** Did you read this case?

14 **A.** I don't recall.

15 **Q.** Were you interested in what this case had to say?

16 **A.** I don't recall.

17 **Q.** All right. Next slide, please. Go to page -- it will
18 be slide Page 7. It will be Page 9. There we go.

19 This says "Suspicious Orders." And we don't need to go
20 through this again. But do you see the second bullet point,
21 "Report Suspicious Orders to DEA When Discovered." Do you
22 see that?

23 **A.** Yes.

24 **Q.** All right. So do you acknowledge that this is a
25 communication by the DEA to CSRA that you have a duty to

1 report suspicious orders when discovered?

2 **A.** Yes.

3 **Q.** That was the DEA's position is that when you discover
4 it, you have to tell us; correct?

5 **A.** Yes.

6 **Q.** And did you infer in that that you were still allowed
7 to ship it?

8 MR. NICHOLAS: Object to the -- I'll object to the
9 lack of foundation. It's a loaded question.

10 THE COURT: Well, if he knows.

11 THE WITNESS: What, what time frame again are you
12 referencing?

13 BY MR. FARRELL:

14 **Q.** This is 2005.

15 **A.** Yes, report, report suspicious orders to DEA when
16 discovered, correct.

17 **Q.** And, so, did you, the head of CSRA, interpret this to
18 mean that you could still ship the order after you reported
19 it?

20 **A.** Yes.

21 **Q.** Why would they have -- what would be the purpose of
22 reporting an order that's suspicious when it's discovered to
23 still ship it?

24 **A.** Because a suspicious is not a bad order. A suspicious
25 order -- when we stop an order that affects -- it affects

1 patient care. These are legitimate drugs. Right? They're,
2 they're -- there's patients that need those drugs. The
3 pharmacy places the order. The patient's going to be coming
4 to pick it up. You have a doctor that made the decision to
5 write this prescription. You have a pharmacy that sees the
6 patient and has a corresponding responsibility to fill the
7 prescription. And then you want us to override it.

8 The regulation was written to report a suspicious order
9 and then ship it not to affect patient care. If there's
10 something bad with the order, DEA has it suspicious. They
11 should take action, either close the pharmacy, revoke the
12 doctor's license. Our responsibility is to report the
13 suspicious order, not the bad order.

14 **Q.** So is it fair to say that you believe this is not your
15 job?

16 **A.** What job? Our job is to report suspicious orders and
17 the DEA takes that information and they perform their
18 enforcement or regulatory responsibility, correct.

19 **Q.** So once the pills leave your physical control, it's not
20 your job to prevent diversion?

21 **A.** I have no ability to prevent diversion outside of the
22 control of those products, correct. We're responsible to
23 make sure we get the transportation company that delivers to
24 the pharmacy. And there's a reason why the pharmacist has
25 to sign, or the pharmacy has to sign for to change control

1 from our registration. It transfers. The quantity
2 transfers from our registration to their registration with
3 the same requirements.

4 **Q.** Okay. Let's go to the next slide, same slide deck,
5 same time frame, suspicious orders. Will you read the
6 bullet point the DEA was communicating to AmerisourceBergen?

7 **A.** "Reporting a suspicious order to DEA does not relieve a
8 distribution [sic] of the responsibility to maintain
9 effective controls."

10 **Q.** So I take it you disagree with this?

11 **A.** No, I agree with that. We have a lot of other controls
12 to prevent diversion. Just because we report suspicious
13 orders, that doesn't mean we can't keep product in the
14 vault, have an order keeping recommendations, the same
15 criminal background.

16 All those are under the C.F.R. for -- adequate controls
17 to prevent diversion include a multitude of things, one
18 being a suspicious order.

19 I read that if you do not -- by reporting a suspicious
20 order doesn't mean you relieve yourself of all those other
21 requirements under the C.F.R. to prevent diversion. That's
22 how I read that. I, I agree with that.

23 **Q.** Go to Page 13, summary page of this slide deck.

24 "The pattern of drugs being distributed to pharmacies
25 who are diverting controlled substances demonstrates the

1 lack of effective controls against diversion by the
2 distributor."

3 Does this slide not communicate to you, Mr. Zimmerman,
4 that the DEA is telling you your obligations go beyond just
5 ensuring that the pharmacy has a DEA registration?

6 **A.** If we have knowledge that the -- "The pattern of drugs
7 being distributed to pharmacies --"

8 COURT REPORTER: Excuse me, Mr. Zimmerman. Slow
9 down, please.

10 THE WITNESS: I'll slow down.

11 I don't know they're diverting controlled substances.
12 That statement says the pattern of drugs you're selling to
13 the pharmacies, if they're diverting those controlled
14 substances demonstrates a lack of effective controls. I
15 agree with that statement. But I don't -- we don't know
16 those pharmacies are diverting those drugs or we wouldn't be
17 selling them to them.

18 BY MR. FARRELL:

19 **Q.** Sure. Let's talk -- let's switch topics real
20 quick. Let's talk about an argument that was made
21 that -- does AmerisourceBergen consider whether or not a
22 community is a healthcare hub when determining
23 thresholds or the volume of pills sold to a pharmacy?

24 **A.** I'm not familiar with that term.

25 **Q.** Yeah, that's, that's inartful. Does AmerisourceBergen

1 consider whether or not there are hospitals within a
2 community when determining whether or not the volume of
3 pills is suspicious?

4 **A.** I'm not sure.

5 **Q.** Does AmerisourceBergen consider any patient
6 demographics when determining the appropriate volume of
7 pills or setting thresholds in the community?

8 **A.** In what time frame?

9 **Q.** Let's just say 2007.

10 **A.** I don't believe we were looking at that.

11 **Q.** How about does AmerisourceBergen look into age or, or
12 obesity or any other demographics when determining an
13 appropriate level of opioids to sell?

14 **A.** In 2007, no.

15 **Q.** Are you aware of any justification for -- internally at
16 CSRA when you do your due diligence on proximity of a
17 pharmacy to, say, a pain clinic or a physician's office or a
18 tertiary care facility?

19 **A.** I think that's one of the items they look at.

20 **Q.** For instance, your lawyers in this case in both opening
21 and on several other occasions mentioned the fact that there
22 are 29 other counties that send patients to the hospitals in
23 Huntington. Have you heard this before?

24 **A.** No. I mean, I'm not sure what you're referencing.

25 **Q.** Let me ask you --

1 **A.** I know people have traveled to the hospitals. I just
2 don't know the exact statement you're making.

3 **Q.** Have you been following this trial so far?

4 **A.** You mean like reading transcripts and stuff? No.

5 **Q.** Have you been watching it?

6 **A.** Not from -- I've been told not to watch it.

7 **Q.** Did you see opening or read about opening?

8 **A.** No.

9 **Q.** Okay. So you're aware, though, that one of the
10 defenses that AmerisourceBergen is raising is that CSRA was
11 justified in clearing orders into Cabell County because it
12 was a hub of healthcare for the 29 surrounding counties?

13 You're aware of that?

14 MR. NICHOLAS: I'll object to the question in
15 light of the last, the previous three or four answers and in
16 light of the fact that he's characterizing I guess what I
17 said in my opening. I'll object to the -- I'll object to
18 the question.

19 THE COURT: Sustained.

20 MR. FARRELL: Your Honor, they've asked our
21 witnesses on no less than 10 occasions --

22 THE COURT: Well, I sustained the objection, Mr.
23 Farrell. You're stuck with that.

24 MR. FARRELL: Yes, sir.

25 BY MR. FARRELL:

1 **Q.** Does it -- you said that it does make a difference
2 if a community is a healthcare hub in a, in a particular
3 region. Agreed?

4 **A.** I said they take into account.

5 **Q.** Take into account?

6 **A.** Right. That's one of the elements that they look at,
7 correct.

8 **Q.** So do you also take into account the volume of pills in
9 the surrounding communities?

10 **A.** In 2007?

11 **Q.** At any point.

12 **A.** I'm not sure. I don't know.

13 **Q.** You're the head of CSRA and you've said that a factor
14 in determining whether or not a volume of pills is excessive
15 is whether or not it's a hub for healthcare for surrounding
16 counties. That was your testimony. Correct?

17 **A.** I said that's one of the elements they look at.

18 **Q.** It's one of the elements?

19 **A.** Right.

20 **Q.** So my question to you is whether or not you also look
21 as an element on what the surrounding counties --

22 **A.** Right.

23 **Q.** -- are, are purchasing to determine whether or not the
24 shipments are appropriate.

25 **A.** And I said I don't know.

1 **Q.** For instance, reference was made earlier to the fact
2 that the two hospitals in Huntington/Cabell County, West
3 Virginia, serve the 29 surrounding counties.

4 My question to you is, is in the surrounding counties
5 would you have looked at the volume of pills at those places
6 or looked up which counties serviced the hospitals?

7 MR. NICHOLAS: Objection, asked and answered
8 several times.

9 MR. FARRELL: This is different. This is
10 different.

11 THE COURT: Yeah, overruled.

12 THE WITNESS: I don't know.

13 BY MR. FARRELL:

14 **Q.** I'm going to give you a specific example.

15 Will you bring up the Mountain Health Network.

16 So it was referenced earlier and you've said as an
17 element there are two big hospitals in Huntington/Cabell
18 County. And, so, it's not surprising that perhaps those
19 numbers are elevated. Do you understand what that position
20 would be?

21 **A.** Did I -- I said that?

22 **Q.** I'm asking you this.

23 **A.** Oh, I thought you said I said there were two large --

24 **Q.** You testified that it is an element as to whether or
25 not a particular location is a hub or a tertiary care

1 facility that justifies elevated numbers. Okay? You said
2 that's a factor.

3 **A.** That's just one of the elements they look at, yes.

4 **Q.** So this is -- from the healthcare hospital in
5 Huntington, Cabell County that services other counties,
6 would your CSRA have considered, in addition to the volume
7 of pills coming into Cabell County, would you expect your
8 CSR investigators to look at what other counties are
9 referring patients to Cabell County, including in Kentucky
10 Boyd County, Carter County, Greenup County, Johnson County,
11 Lawrence County, Martin County; in Ohio, Gallia County,
12 Lawrence County, Meigs County, Scioto County, the Dreamland,
13 Portsmouth; and in West Virginia Boone County, Fayette
14 County, Jackson County, Kanawha County, Lincoln County,
15 Logan County, Mason County, Mingo County, Putnam County,
16 Raleigh County, Wayne County, and Wyoming County?

17 MR. NICHOLAS: I'll object to -- I guess I'd like
18 to see the -- I think this is based on a document. Mr.
19 Farrell is holding a document in his hand. I don't know if
20 that's the document that we're talking about. This is
21 simply a display that he's reading from and I guess he's put
22 together. And I think there's a lack of foundation or
23 backup for it.

24 THE COURT: Well, I don't understand where you're
25 going with this, Mr. Farrell.

1 MR. FARRELL: Well, so, the, the witness has
2 testified that he would consider the fact that there are two
3 big hospitals in Huntington as justification for there being
4 a higher volume of pills because --

5 THE COURT: So you're saying patients would come
6 from other places and that would impact the numbers.
7 Correct?

8 MR. FARRELL: So that's what I'm saying, Judge.

9 THE COURT: I got the point, didn't I?

10 MR. FARRELL: Yes, sir.

11 THE COURT: I'm going to overrule the objection.

12 Can you answer the question?

13 THE WITNESS: I don't know.

14 THE COURT: Okay.

15 BY MR. FARRELL:

16 Q. All right. I think we can put away the Distributor
17 Initiative.

18 MR. FARRELL: Oh, can I renew my admission to
19 admit P-9112a that removes the front page?

20 THE COURT: Well, is there any objection to it?

21 MR. HESTER: Your Honor, we would object to its
22 introduction for the truth.

23 THE COURT: Well, that's right, isn't it,
24 Mr. Farrell?

25 MR. FARRELL: Well, it may, it may be right, but

1 it doesn't matter because it's more of the notice, of the
2 DEA putting AmerisourceBergen of notice of the contents
3 therein.

4 THE COURT: How about that, Mr. Hester?

5 MR. HESTER: We don't object to its introduction
6 on the basis that it was stated, but it just can't be
7 introduced for the truth in our view. That would be our
8 objection, Your Honor.

9 MR. NICHOLAS: I don't object to the admission of
10 the document, but I would ask actually that the entire
11 document be put in including the cover page.

12 THE COURT: Including the title?

13 Do you want the cover in, Mr. Farrell?

14 MR. FARRELL: I, I feel like I'm on a
15 merry-go-round, Judge. I'm the one that tried to put it in
16 and they objected.

17 THE COURT: Well, the situation has changed now.
18 They're wanting it in.

19 MR. FARRELL: I need to be adaptable. So, yes, I
20 want it in, Judge.

21 THE COURT: We haven't heard from Cardinal.

22 MS. SALGADO: Your Honor, we also object to its
23 introduction for the truth.

24 THE COURT: All right. I'm going to admit it for
25 the limited purpose that it bears upon notice. And I'm not

1 going to admit it for the truth of the matter asserted
2 because it's obviously loaded with hearsay.

3 MR. FARRELL: Thank you, Your Honor.

4 BY MR. FARRELL:

5 **Q.** All right. The next document is P-32. And I'm
6 going to have to make an explanation of this.

7 MR. FARRELL: P-32 is a composite exhibit. And,
8 Judge, may I approach?

9 THE COURT: Pardon me?

10 MR. FARRELL: May I approach?

11 THE COURT: Yes, you may.

12 MR. FARRELL: This is the series of letters from
13 the DEA to AmerisourceBergen. And it's all of the letters,
14 but we're going to, we're going to take them in
15 chronological order.

16 BY MR. FARRELL:

17 **Q.** So I'd have you flip to Page 9 at the bottom, --

18 **A.** Okay.

19 **Q.** -- the document dated September 27th, 2006.

20 Mr. Zimmerman, let me know when you're ready.

21 **A.** Is this the first document?

22 **Q.** Yes, the September 27th, 2006, letter.

23 **A.** Okay.

24 **Q.** Have you seen this document before?

25 **A.** I have.

1 Q. What is it?

4 Q. Have you, have you read it before?

5 **A.** I have.

6 Q. And do you recognize it as a communication from the
7 United States Drug Enforcement Agency to AmerisourceBergen
8 related to the duties to maintain effective control and for
9 the purposes of monitoring suspicious orders?

10 **A.** Yeah. It doesn't say -- I mean, it's not addressed to
11 anybody, but I think they mass mailed it to the
12 distribution, the registrants.

13 Q. Okay. You've testified about this letter, have you
14 not?

15 **A.** I'm sure they asked me questions about that in my
16 deposition, yes.

17 Q. And you acknowledge on behalf of AmerisourceBergen that
18 you received this letter from the DEA?

19 A. Yes.

20 Q. We have referred to it as the Rannazzisi Letter Number
21 1. Have you heard that phrase used before?

22 **A.** I have not.

23 Q. I'm going to call it Rannazzisi Letter Number 1 because
24 it's signed by Joe Rannazzisi. Do you know who Joe
25 Rannazzisi is?

A. I think he was the assistant administrator at the time.

2 Q. Have you met Joe Rannazzisi?

3 **A.** I have.

4 Q. How many times?

A. A couple.

6 Q. Have you talked to him about suspicious order
7 monitoring and diversion?

A. In a group.

9 Q. Are you aware that this letter was intended to be sent
10 to AmerisourceBergen to place it on notice of the positions
11 taken by the DEA?

14 Q. And you read it?

15 **A.** We've read it, yes. I've read it.

16 Q. Did you circulate this to your group?

17 **A.** I think it was sent to the -- it wasn't sent to me
18 because it was sent to the registrant. So it would have
19 went to the distribution center, then probably made its way
20 up to my group.

21 Q. And when you say to your group, did you forward this to
22 the other members of your department?

23 **A.** I probably did or they forwarded it to me.

24 Q. So let's start with the date. What's the date of the
25 letter?

1 **A.** September 27th, 2006.

2 **Q.** Do you see down in the bottom right-hand corner the
3 Bates stamp with the letters ABDC-MDL?

4 **A.** Yes.

5 **Q.** Okay. You don't have to name the zeros, but can you
6 read the numbers?

7 **A.** MDL-00378501.

8 **Q.** And do you recognize this as a Bates stamp from
9 AmerisourceBergen's files?

10 **A.** Yes.

11 **Q.** All right. I'm also going to have you reference the P
12 numbers, P-32 underscore 9. Do you see that?

13 **A.** Yes.

14 **Q.** So there are other letters that are in this block that
15 we'll be talking about. But for right now, we're just going
16 to be talking about Pages 9 and 10.

17 So what I'd like you to do is let's start with the very
18 first paragraph. Will you read the first sentence?

19 **A.** "This letter is being sent to every commercial entity
20 in the United States registered with the Drug Enforcement
21 Administration to distribute controlled substances."

22 **Q.** And what did the DEA tell you was the purpose of this
23 letter?

24 **A.** To reiterate the responsibilities of controlled
25 substance distributors in view of the prescription drug

1 abuse problem our nation currently faces.

2 **Q.** All right. So let's go to the very first paragraph
3 now. Do you see where it says "Background"?

4 **A.** Yes.

5 **Q.** Will you read the first sentence.

6 **A.** "As each of you is undoubtedly aware, the abuse of
7 non-medical use of controlled prescription drugs is a
8 serious and growing health problem in this country."

9 **Q.** Do you agree that as of 2006, from your perspective at
10 AmerisourceBergen, that the abuse, non-medical use of
11 controlled prescription drugs was a serious and growing
12 health problem in the United States?

13 **A.** Yes.

14 **Q.** Do you see where it has a footnote?

15 **A.** Yes.

16 **Q.** All right. At the very bottom, can we blow up the
17 footnote?

18 When you got this letter, did you go look up what that
19 footnote says?

20 **A.** I don't recall.

21 **Q.** All right. Let's go to the next paragraph.

22 **A.** Want me to read it?

23 **Q.** Starting with, "The CSA was designed," and read the
24 next sentence, please.

25 **A.** "The CSA was designed by Congress to combat diversion

1 by providing for a closed system of drug distribution in
2 which all legitimate handlers of controlled substances must
3 obtain a DEA registration and, as a condition of maintaining
4 such registration, must take reasonable steps to ensure that
5 their registration is being utilized as a source of
6 diversion."

7 **Q.** Do you agree with that statement?

8 MR. NICHOLAS: Your Honor, it was misread.

9 MR. HESTER: I object. The witness missed a
10 "not."

11 THE WITNESS: It says "not utilized." Sorry. You
12 shouldn't have me read.

13 BY MR. FARRELL:

14 **Q.** That's okay. The next sentence is really the one
15 that is the most key that I'm interested in. Will you
16 read it, please?

17 **A.** "Distributors are, of course, one of the key components
18 of the distribution chain."

19 **Q.** Do you agree with that?

20 **A.** We are a key component of the distribution chain.

21 **Q.** What's the next one?

22 **A.** "If the closed system is to function properly as
23 Congress envisioned, distributors must be vigilant in
24 deciding whether a prospective customer can be trusted to
25 deliver controlled substances only for lawful purposes."

1 **Q.** Do you agree with that?

2 **A.** I think we have a responsibility to make sure they have
3 their license. I, I differ in your inference that just
4 because we give you a DEA registration you should, you
5 shouldn't sell them drugs. I don't agree with that portion.
6 I think DEA has a responsibility for issuing registrations
7 and it's their responsibility for the pharmacies to maintain
8 them, and they have the authority to revoke them. We don't
9 have any of that authority, nor should we.

10 **Q.** It's not your job?

11 **A.** It's not our job to police the pharmacies? It's not
12 our job to police the pharmacies, that's correct.

13 **Q.** The next sentence?

14 **A.** "This responsibility is critical as Congress has
15 expressly declared that the illegal distribution of
16 controlled substances has a substantial and detrimental
17 effect on the health and general welfare of the American
18 people."

19 **Q.** Do you agree with that?

20 **A.** Yeah, illegal distribution, yes.

21 **Q.** So let's go to Page 2.

22 We're not going to go through -- oh, there it is, Page
23 2.

24 I'm going to -- I'm not going to have you read the
25 entire document. I'm going to ask for its admission to the

1 Court eventually.

2 What I am going to want you to do is I want you to go
3 to the word "nonetheless" in the second full paragraph. Do
4 you see that?

5 **A.** Yes, second paragraph.

6 "Nonetheless, given the extent of the prescription drug
7 abuse in the United States, along with the dangerous and
8 potentially lethal consequences of such abuse, even just one
9 distributor that uses its DEA registration to facilitate
10 diversion can cause enormous harm."

11 **Q.** Do you agree with that?

12 **A.** After "illegally distributed product," yes.

13 **Q.** If the distributor is illegally distributing a product?

14 **A.** Yeah.

15 **Q.** And, so -- okay. Let's go to, let's go to the
16 paragraph starting "thus." Keep going, please. Do you see
17 this paragraph here? I think it's the third from the
18 bottom. Would you please read that paragraph?

19 **A.** "Thus, in addition to reporting all suspicious orders,
20 a distributor has a statutory responsibility to exercise due
21 diligence to avoid filling suspicious orders that might be
22 diverted into other than legitimate medical, scientific and
23 industrial channels. Failure to exercise such due diligence
24 could, as circumstances warrant, provide a statutory basis
25 for revocation or suspension of a distributor's

1 registration."

2 **Q.** Now, this appears to conflict with your view of the
3 statutory requirements. Would you agree with that?

4 **A.** Yes. I don't agree with it.

5 **Q.** You do not agree with it?

6 **A.** Huh-uh.

7 **Q.** But you concede, though, that in 2006 the DEA is
8 putting you on notice that that was their interpretation.

9 **A.** So I worked with the DEA from '96 to '98 to devise a
10 suspicious order reporting program. I worked with them for
11 two years. And we worked with the different offices and we
12 created a suspicious order report that shipped orders after
13 they were identified.

14 It was signed off on by the program managers of the
15 DEA. It was signed off by the chief of the diversion unit
16 at DEA. And that was the program that we had in place at
17 this time.

18 Now, I can take my two years of work and a letter from
19 the chief of the diversion unit or a letter that's not even
20 addressed to us. It just says "registrant." I'm going to
21 go with my two years of work. And never once did they
22 mention what they felt their interpretation was because
23 their interpretation was you do ship the order. And all I
24 could -- so I'm going to go with my two years and approved
25 letter versus an unregistered letter.

1 **Q.** Did you follow up on this letter? Did you call Mr.
2 Rannazzisi?

3 **A.** I don't think so.

4 **Q.** Did you send them a letter?

5 **A.** I know I didn't. Excuse me?

6 **Q.** Did you send them a letter? Did you write to them?

7 **A.** No.

8 **Q.** Let's go to the next paragraph starting with, "Given
9 the requirement under Section 823(e) that a distributor
10 maintain effective controls against diversion," will you
11 finish the sentence, please?

12 **A.** "Given the requirement under Section 823(e) that a
13 distributor maintain effective controls against diversion, a
14 distributor may not simply rely on the fact that the person
15 placing the suspicious order is a DEA registrant and turn a
16 blind eye to the suspicious circumstances."

17 **Q.** Do you agree with that?

18 **A.** Yeah. I don't think you should -- you can't ignore
19 what's going on.

20 **Q.** Mr. Zimmerman, this is, this is saying something a
21 little different. So the court reporter has it, this
22 sentence from the DEA is literally saying that you may not
23 rely upon the fact that the person you're selling these
24 drugs to has a DEA registration and turn a blind eye to
25 suspicious circumstances or you may lose your license.

1 That's what the DEA is telling you at ABC; correct?

2 MR. NICHOLAS: I'll object. He's testifying.

3 He's interpreting.

4 THE COURT: Yeah, I agree. You're, you're --

5 that's not the witness, Mr. Farrell.

6 MR. FARRELL: That's a very poor question.

7 BY MR. FARRELL:

8 **Q.** You would agree with me, then, that -- did the DEA
9 provide notice to AmerisourceBergen that selling to a
10 registrant, a duly licensed registrant is insufficient
11 to comply with federal regulations?

12 **A.** Say that one more time, sir.

13 **Q.** Did the DEA provide notice to you, Chris Zimmerman, as
14 the head of CSRA at AmerisourceBergen that you had to do
15 more than just check to see if the pharmacy had a valid DEA
16 registration?

17 **A.** I mean, in this letter -- he, he mentions it in the
18 letter. But there's no change in regulation, no change --
19 again, they're trying to regulate by letter and there's a
20 process. If you want to change the regulations or your
21 requirements, then there's a process to do that, and it's
22 usually not from an unregistered letter that's not even a
23 mention at the top. I mean, so --

24 **Q.** Sir, you were on notice that the DEA was requiring ABC
25 to prevent diversion.

1 **A.** We prevent diversion and we don't just rely on the
2 license, correct. We would have a whole host of other
3 things that we looked at to make sure that all the other
4 regulatory requirements to prevent diversion are in place,
5 including reporting suspicious orders.

6 **Q.** So we're going to put a pin on this and come back to
7 the other letters. But you are aware, are you not, that
8 soon after this in April of 2007 the DEA suspended your, one
9 of your distribution centers for failing to maintain
10 effective control?

11 **A.** Correct.

12 **Q.** For the very things that were in the Rannazzisi Letter
13 1, AmerisourceBergen got one of its distribution center's
14 license temporarily suspended?

15 **A.** Correct.

16 **Q.** And in the allegations in the Immediate Suspension
17 Order was that --

18 Well, first, can we have the copies, please?

19 Judge, may I approach?

20 THE COURT: Yes.

21 BY MR. FARRELL:

22 **Q.** This is P-49. Mr. Zimmerman, do you recognize this
23 document?

24 **A.** I do.

25 **Q.** What is it?

1 **A.** It's an order to show cause and immediate suspension of
2 registration dated April 19th.

3 **Q.** And is this -- was this served on AmerisourceBergen?

4 **A.** It was served on April 24th, five days after.

5 **Q.** But you know what it is? You've seen it, you've read
6 it?

7 **A.** Yes.

8 **Q.** You were involved in the process following the service
9 of the Immediate Suspension Order?

10 **A.** Yes.

11 **Q.** And you negotiated a resolution of it?

12 **A.** I worked on that, yes.

13 MR. FARRELL: Judge, I'd move P-49 into the
14 record.

15 MR. NICHOLAS: We have no objection, Your Honor.

16 THE COURT: Is there any objection?

17 MR. HESTER: No objection.

18 MR. NICHOLAS: No objection, Your Honor.

19 THE COURT: It's admitted.

20 BY MR. FARRELL:

21 **Q.** So if you look at Paragraph 1 on the front page,
22 the allegation is that AmerisourceBergen sold to a
23 single pharmacy over a period of 13 months 3.8 million
24 dosage units of hydrocodone. You're aware of that
25 allegation?

1 **A.** Yes.

2 **Q.** Was that true?

3 **A.** I believe so.

4 **Q.** And look at Paragraph 3. The allegation was that from
5 January '06 to January '07 to a different pharmacy, that
6 AmerisourceBergen sold over a million hydrocodone dosage
7 units. Was that allegation true?

8 **A.** Yes, which, which was identified by us, reported to the
9 DEA, and closed by us --

10 **Q.** So --

11 **A.** -- prior to this order.

12 **Q.** Then go to Page 3, the top of Page 3. The Immediate
13 Suspension Order says that there was a meeting on
14 August 10th, 2015, where AmerisourceBergen was warned that
15 they had sold over 5.2 million dosage units to pharmacies
16 that bore characteristics that describe -- that were
17 described during that meeting.

18 **A.** Uh-huh.

19 **Q.** Do you understand that's the allegation?

20 **A.** That's the allegation.

21 **Q.** And you understand that this is now following that
22 distributor initiative meeting, following Rannazzisi Letter
23 1, AmerisourceBergen was still doing the same thing under
24 their same policies?

25 **A.** Under the approved program by the DEA, correct. We

1 were following our approved DEA program, correct.

2 **Q.** And that's why you got an Immediate Suspension Order?

3 **A.** I don't know why we -- I don't know that for sure.

4 **Q.** Well, it says right here that in the allegations of the
5 Immediate Suspension Order that they met with you, they
6 warned you, and you continued to sell after the meeting in
7 volumes that were excessive, and that's why you were getting
8 suspended. Agreed?

9 **A.** We closed three or four on here well before -- we
10 conducted over 100 investigations after that '05 meeting to
11 go over the things that were identified in the presentation.
12 We closed some of those accounts and then we created
13 additional forums to protect the company.

14 So we took action from 2005 to 2007. And then prior to
15 2006 working with the local DEA office in Orlando, we shut
16 down other pharmacies that were diverting product.

17 So this was a surprise to me when we received it
18 because we were doing the things that they went over in the
19 meeting. We were working with the local DEA office. We had
20 shut down the majority of the pharmacies noted in here. And
21 it took them five days to serve an immediate order.

22 **Q.** Okay. Subsequent to that, you personally negotiated a
23 settlement agreement with the DEA; correct?

24 **A.** Correct.

25 MR. FARRELL: Judge, may I approach?

1 THE COURT: Yes.

2 BY MR. FARRELL:

3 **Q.** I'm going to hand you what's P-9. I'll give you a
4 second to read it. Is this the Settlement Agreement and
5 Release that you entered into on behalf of
6 AmerisourceBergen following the Immediate Suspension
7 Order?

8 (Pause)

9 Mr. Zimmerman, please tell me when you're ready.

10 **A.** Yep.

11 **Q.** This is a settlement agreement dated June 22, 2007.
12 Have you seen this document before?

13 **A.** I have.

14 **Q.** Can you verify and validate that this is the settlement
15 agreement entered into between the DEA and AmerisourceBergen
16 following the Immediate Suspension Order we just discussed?

17 **A.** Yes.

18 MR. FARRELL: Judge, I'd ask for the admission of
19 P-9.

20 THE COURT: Any objection?

21 MR. NICHOLAS: No objection.

22 BY MR. FARRELL:

23 **Q.** As you go to Page 2 --

24 THE COURT: Wait a minute.

25 MR. HESTER: No objection, Your Honor.

1 MS. MAINIGI: No objection.

2 THE COURT: There being no objection, it's
3 admitted.

4 BY MR. FARRELL:

5 Q. Let's go to Page 2. There's no admission of fault
6 in this, is there, sir?

7 A. That's what it says, yeah.

8 Q. But if you look at Paragraph 3, "Covered Conduct," it
9 includes not only the facility -- I wish I had my glasses --
10 in Orlando, but this release also covers all other
11 distribution facilities controlled by AmerisourceBergen with
12 respect to all sales of ARCOS reportable controlled
13 substances. Correct?

14 A. Yes.

15 Q. You negotiated a release on behalf of every
16 distribution center in America; correct?

17 A. It includes -- the system included all distribution
18 centers, correct.

19 Q. And, in fact, they list -- on the back page they list
20 an appendix. And one of those distribution centers included
21 in this release and agreement is the Lockbourne, Ohio, one
22 that shipped to Huntington/Cabell County. Agreed?

23 A. I would assume so.

24 Q. Let's go back to Page 2, "Obligations of
25 AmerisourceBergen." You negotiated an agreement with the

1 DEA and you made a promise down here, Paragraph A,
2 "AmerisourceBergen agrees to maintain a compliance program
3 designed to detect and prevent diversion of controlled
4 substances," and it shall apply to all of your facilities in
5 America. Do you agree with that?

6 **A.** Yes.

7 **Q.** And this is the, this is the spawning of the 2007 OMP
8 program; correct?

9 **A.** Correct.

10 **Q.** So following the, this agreement, following the MOU,
11 are you aware of correspondence between your counsel and the
12 DEA regarding effectuating this settlement agreement and the
13 implementation of your new OMP program?

14 **A.** There was communication, yes.

15 **Q.** I'm sorry?

16 **A.** There was -- I'm not sure what you're referencing to.

17 MR. FARRELL: Judge, may I approach?

18 THE COURT: Yes.

19 BY MR. FARRELL:

20 **Q.** I'm going to hand you what's marked as P-877.

21 **A.** Thank you.

22 **Q.** When you get a chance, Mr. Zimmerman, tell me when
23 you're ready.

24 **A.** Okay.

25 **Q.** What is this document, Mr. Zimmerman, if you know?

1 **A.** It's a letter from a Reed Smith attorney to Linden
2 Barber, an attorney at DEA.

3 **Q.** So have you seen this letter before today?

4 **A.** I have.

5 **Q.** In fact, you were courtesy-copied on this letter;
6 correct?

7 **A.** Yes.

8 **Q.** This is a communication by AmerisourceBergen through
9 its counsel to the DEA's counsel regarding the
10 implementation of the promises you made in the settlement
11 agreement. Agreed?

12 **A.** Yes.

13 MR. FARRELL: Judge, I'd ask for P-877 to be
14 admitted into the record.

15 THE COURT: Any objection?

16 MR. NICHOLAS: No objection.

17 MR. HESTER: No objection, Your Honor.

18 THE COURT: All right. It's admitted.

19 BY MR. FARRELL:

20 **Q.** Now, when you look at it, the first paragraph, it
21 basically sets up the premise that, hey, we had these
22 discussions. We're going to talk about the
23 implementation of the agreement. Correct?

24 **A.** Yes.

25 **Q.** And then the second paragraph is the one that says, "To

1 begin, as noted in the telephone voicemail message to me
2 from Larry Cote --" I don't know how you pronounce that.

3 **A.** Cote.

4 **Q.** Cote?

5 **A.** Yeah.

6 **Q.** So do you know who Larry Cote is?

7 **A.** Yes.

8 **Q.** Do you know who Linden Barber is?

9 **A.** Yes.

10 **Q.** In 2007 what were they to you?

11 **A.** Linden Barber was the senior attorney and Larry Cote
12 was the, was also an attorney within DEA. They were
13 involved in all the negotiations.

14 **Q.** So they were the -- they were the United States
15 Attorneys that were prosecuting AmerisourceBergen in 2007;
16 correct?

17 **A.** They were -- I don't think -- they weren't U.S.
18 Attorneys. They were in the -- let's see. What does it
19 say? They were in the Office of Diversion and Regulatory
20 Litigation Section of the DEA. Maybe -- I'm sorry. I'm not
21 an attorney, so maybe that's -- I don't think they worked
22 for the U.S. Attorney's Office. I think they were employed
23 by the DEA which is I guess a subset of the DOJ but --

24 **Q.** Right. But later on did your relationship turn from
25 adversarial to collaborative with both Mr. Barber and Mr.

1 Cote?

2 **A.** Adversarial -- I mean, we worked together to resolve
3 the issue. But if you mean adversarial because they were on
4 the DEA side and we were on the industry side, and I think
5 they've since left the DEA but, I mean, my relationship with
6 them didn't change.

7 **Q.** Now they work for your industry, do they not?

8 **A.** Linden I believe may. Larry I believe worked for a law
9 firm. I'm not sure.

10 **Q.** Okay. So going to this, it basically says in this
11 second paragraph that the DEA has had frequent direct
12 telephone contact with Chris Zimmerman, Vice President for
13 Corporate Security and Regulatory Affairs, to implement the
14 technical exchange, the technical exchange of electronic
15 information which AmerisourceBergen is to provide to the DEA
16 under the agreement. Did I read that accurately?

17 **A.** Yes.

18 **Q.** Now, during this time of your frequent direct telephone
19 contact with the DEA, did you communicate to them your
20 disagreement with the Rannazzisi letter?

21 **A.** No.

22 **Q.** Did you communicate with them your disagreement of
23 their interpretation of the regulatory requirements outlined
24 in the Immediate Suspension Order?

25 **A.** No.

1 **Q.** Go to the bottom paragraph.

2 MR. FARRELL: I'm going to try to get through this
3 document quickly, Judge.

4 BY MR. FARRELL:

5 **Q.** Let's go to the next page. You don't need to blow
6 up the next page. It's right here. What I'm going to
7 point to is I'm going to point to the top paragraph
8 here. I'm going to read it for you.

9 "As AmerisourceBergen and DEA have agreed, the local
10 distribution center will review such orders in a timely
11 fashion in order to determine whether or not the order
12 appears to be legitimate, notwithstanding the automated
13 system having flagged the order."

14 Did I read that correctly?

15 **A.** Yes.

16 **Q.** It goes on to say such orders that get flagged but then
17 after diligent review get released need not be reported to
18 the DEA; correct? That's the rest of that paragraph.

19 **A.** Correct.

20 **Q.** The DEA is telling you that if you flag it and then
21 eyeball it and clear it, you don't need to report it. We
22 don't need voluminous reports of everything you flagged.
23 Agreed?

24 **A.** Correct.

25 **Q.** Now, next paragraph says, "Any orders which the local

1 distribution center cannot confirm as legitimate are to be
2 held and not shipped to the customers pending more in-depth
3 inquiry by ABDC's national CSRA investigatory group."

4 Did I read that accurately?

5 **A.** Yes.

6 **Q.** You promised the DEA in 2007 that you would block
7 suspicious orders until they're cleared by due diligence,
8 didn't you?

9 **A.** That was the program we designed. If they cleared it
10 at the DC, they could ship it. And I'm not sure what your
11 question is.

12 **Q.** We just argued earlier about whether or not you had a
13 duty to block shipments of suspicious orders. Your position
14 is you do not. Agreed?

15 **A.** My position as -- was written as the Code of Federal
16 Regulations is written. I also wouldn't categorize it as
17 arguing with you.

18 **Q.** That's fair.

19 **A.** Okay.

20 **Q.** I apologize for that reference. Your position,
21 succinctly stated, is that this block of suspicious orders
22 isn't written in the code; correct?

23 **A.** Correct.

24 **Q.** And the DEA believes it's inferred in the law and that
25 it's a duty for you to maintain effective control. Is that

1 succinctly stated?

2 MR. HESTER: Object to the form, Your Honor. It's
3 asking for speculation of the DEA's position.

4 THE COURT: Sustained.

5 BY MR. FARRELL:

6 Q. The DEA's position is stated in the Prevoznik depo.
7 We'll leave that alone. Nonetheless, you promised the
8 DEA in 2007 you would block suspicious orders?

9 A. I agree this is the, this is the -- that was part of
10 the agreement, correct.

11 Q. That was a promise made by you at AmerisourceBergen
12 that you would start blocking suspicious orders?

13 A. Correct.

14 Q. Go to the paragraph, "The remaining orders."

15 THE COURT: When you get to a stopping place, Mr.
16 Farrell, we'll have to adjourn until tomorrow.

17 MR. FARRELL: I was just getting a roll going,
18 Judge. This will be the last document for the day, Judge.

19 THE COURT: Okay.

20 MR. FARRELL: There may be one more if I can beg
21 your leniency.

22 BY MR. FARRELL:

23 Q. This last paragraph here, Mr. Zimmerman, "The
24 remaining orders," flagged orders, "will be investigated
25 under your direction and will not be shipped unless they

1 can be confirmed as bona fide."

2 That's the promise made to the DEA as of July 11th,
3 2007. Agreed?

4 **A.** That -- this was the letter that they were discussing.
5 Keep in mind that the agreement was signed in June, but we
6 didn't -- they didn't release our license in August. So
7 from June to August we were going back and forth designing
8 the system, you know, the every day phone calls with Mike
9 Mapes.

10 And then pursuant at the completion of the process,
11 they would inspect our facilities and then release our
12 license.

13 So what's in this letter is communication from Efrem to
14 Linden. I wouldn't say it's black and white at this point,
15 not until they released the license was the system
16 completed.

17 We were still -- like I said, it was a brand new system
18 that we were putting in place for nationwide. It was a
19 complete shift in the industry at that time.

20 **Q.** And this shift you acted on by making a promise to the
21 DEA as set forth in July of 2007?

22 **A.** We made an agreement, yeah.

23 **Q.** And, so, what you said was give us our license back.
24 We will do this.

25 **A.** We will put the system in place. You will inspect it

1 and approve -- once you approve our system that we put in
2 place in August, then they'll give us our license back.

3 **Q.** And 24 years later you -- no, that's not right. 14
4 years later you still disagree with the position taken by
5 the DEA?

6 **A.** It's -- again, I think my interpretation -- I think the
7 interpretation is one of -- one to protect the supply chain,
8 have adequate control for the diversion, but also keeping in
9 mind the patients that needed the product.

10 These are FDA approved drugs. Everyone is licensed
11 along the supply chain. They each have their
12 responsibilities.

13 Was the suspicious order meant to block it? Then why
14 didn't they say you can't ship suspicious orders in the Code
15 of Federal Regulations? Or was it alert DEA that there
16 could be a suspicious circumstance so we can investigate?

17 I don't -- again, it was written in 1970. Rannazzisi
18 sent some letters giving his opinion of it. We worked with
19 DEA for two years, had a different opinion of it.

20 There's other issues that I'm sure are going to come up
21 through this case. You're going to see other opinions on
22 the suspicious order process.

23 So it's, it's a very vague requirement. It's, you
24 know, it's not black and white, so there's a lot open to
25 interpretation.

1 **Q.** Mr. Zimmerman, 14 years later you still disagree with
2 the DEA?

3 **A.** That's the program we have in place.

4 **Q.** One last time. 14 years later, you still disagree with
5 the DEA?

6 **A.** I disa- -- I agree, or I feel the regulation was
7 written as such to report suspicious orders and not to stop.
8 It doesn't mean you can't stop the orders, but I just don't
9 see that requirement in the Code of Federal Regulations when
10 I read it.

11 **Q.** You disagree with the DEA still 14 years later?

12 MR. NICHOLAS: I object.

13 THE COURT: It's been asked and answered about
14 three times, Mr. Farrell.

15 I think this is a good place to stop until tomorrow
16 morning.

17 MR. FARRELL: Yes, sir.

18 THE COURT: I'll see everybody at 9:00.

19 (Trial recessed at 5:06 p.m.)

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1 CERTIFICATION:

2 I, Ayme A. Cochran, Official Court
3 Reporter, and I, Lisa A. Cook, Official Court Reporter,
4 certify that the foregoing is a correct transcript from
5 the record of proceedings in the matter of The City of
6 Huntington, et al., Plaintiffs vs. AmerisourceBergen
7 Drug Corporation, et al., Defendants, Civil Action No.
8 3:17-cv-01362 and Civil Action No. 3:17-cv-01665, as
9 reported on May 12, 2021.

10

11 s\Ayme A. Cochran

s\Lisa A. Cook

12

Reporter

Reporter

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15 May 12, 2021

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Date

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25

■	12 [6] - 1:19, 7:4, 43:9, 172:21, 238:9, 238:15	19th [1] - 223:2 1:30 [1] - 97:18	32:3, 32:7, 46:19, 46:23, 47:2, 47:17, 48:3, 48:18, 49:11, 149:10	4:9 2nd [1] - 96:7		
0	126 [1] - 3:5 13 [15] - 12:17, 13:20, 14:5, 15:16, 16:3, 18:11, 18:17, 18:21, 20:25, 35:10, 36:10, 53:7, 202:23, 223:23 1300 [1] - 6:15 130174 [1] - 67:14 1311 [2] - 2:4, 2:16 14 [8] - 42:25, 43:8, 43:13, 73:21, 236:3, 237:1, 237:4, 237:11 1428 [1] - 21:9 15 [4] - 23:6, 31:7, 172:18, 172:21 15,000 [1] - 114:10 15,200 [5] - 93:12, 94:1, 116:24, 117:3, 117:7 150 [2] - 151:20, 197:5 156 [1] - 40:10 15910 [1] - 3:18 16 [16] - 8:23, 13:5, 13:19, 14:24, 15:8, 16:3, 17:22, 18:6, 18:11, 18:17, 18:22, 22:16, 22:21, 96:4, 96:5 1600 [1] - 3:17 162 [2] - 40:24, 41:3 17 [8] - 9:7, 13:7, 24:25, 25:7, 102:17, 102:22, 103:13, 103:14 17,365,587 [1] - 26:16 17.08 [1] - 103:2 170-mile [1] - 54:16 1717 [2] - 6:6, 6:13 18 [5] - 10:5, 31:7, 103:20, 103:25, 105:6 19087 [1] - 6:15 19103 [2] - 6:6, 6:13 1943 [3] - 198:17, 198:21, 199:7 1950s [1] - 30:21 1970 [1] - 236:17 1990 [2] - 128:11, 188:22 1993 [2] - 46:1, 46:8 1996 [3] - 33:18, 33:22, 193:4 1997 [10] - 46:19, 46:20, 47:3, 47:7, 47:16, 48:2, 48:17, 49:10, 50:6, 51:4 1998 [2] - 50:7, 170:4	2 2 [10] - 72:13, 101:11, 157:19, 166:24, 197:1, 217:21, 217:23, 226:23, 227:5, 227:24 2% [2] - 119:18, 119:21 2,102 [1] - 15:10 2.2 [2] - 72:21, 73:8 2.6 [2] - 73:6, 73:9 2.8 [1] - 14:22 20 [6] - 10:9, 69:4, 71:18, 78:17, 148:24, 148:25 20-some [1] - 93:10 20001 [1] - 5:12 20004 [1] - 4:7 20005 [3] - 4:14, 4:16, 5:5 2001 [7] - 128:15, 128:17, 128:20, 128:23, 129:11, 193:25, 194:6 2002 [1] - 33:24 2004 [1] - 34:2 2005 [9] - 194:12, 194:18, 197:17, 197:25, 198:11, 198:22, 199:6, 200:14, 225:14 2006 [18] - 12:20, 24:16, 24:24, 26:5, 32:23, 33:11, 36:21, 72:20, 72:24, 76:7, 188:4, 188:19, 211:19, 211:22, 214:1, 215:9, 219:7, 225:15 2007 [25] - 73:5, 73:6, 92:4, 132:16, 132:25, 133:3, 134:12, 134:14, 147:4, 176:15, 192:10, 192:12, 204:9, 204:14, 206:10, 222:8, 225:14, 226:11, 228:7, 230:10, 230:15, 233:6, 234:8, 235:3, 235:21 2008 [3] - 38:20, 39:1, 123:20 2009 [1] - 30:2 2010 [15] - 29:2, 30:2, 31:12, 31:16, 31:23, 31:23	2011 [7] - 7:25, 8:13, 9:3, 116:24, 134:17, 134:23, 138:16 2013 [2] - 46:1, 46:6 2014 [22] - 12:20, 24:16, 24:24, 26:5, 27:19, 27:24, 28:12, 32:23, 33:11, 34:12, 34:13, 34:17, 34:25, 36:14, 37:2, 37:12, 37:21, 38:6, 76:7, 188:4, 188:19, 192:12 2015 [5] - 34:13, 34:16, 143:22, 192:15, 224:14 2018 [4] - 25:18, 163:24, 167:2, 194:22 2019 [2] - 46:17, 47:7 202 [2] - 2:4, 2:16 2021 [4] - 1:19, 7:4, 238:9, 238:15 21 [2] - 10:14, 54:24 213 [2] - 132:6, 132:23 22 [1] - 226:11 2216 [1] - 3:7 24 [2] - 10:19, 236:3 24013 [2] - 68:11, 68:16 24th [1] - 223:4 25 [4] - 5:5, 24:8, 78:4, 78:17 25,002 [1] - 16:18 25-30 [1] - 149:5 25301 [3] - 2:8, 3:13, 4:19 25322 [1] - 6:9 25338-3843 [1] - 5:15 255 [1] - 50:14 257 [1] - 50:14 25701 [1] - 3:10 27 [2] - 149:9, 149:10 27,000 [2] - 17:1, 86:14 27,876 [1] - 16:19 27th [3] - 211:19, 211:22, 214:1 28 [3] - 3:15, 4:3, 4:9 2804 [1] - 164:6 285,891 [3] - 40:25, 41:5, 41:9 29 [5] - 29:22, 32:11, 204:22, 205:12, 207:3 29464 [3] - 3:15, 4:4,	3 3 [6] - 71:19, 224:4, 224:12, 227:8 3.8 [1] - 223:23 30 [2] - 148:14, 169:2 30(b)(6) [7] - 164:2, 164:6, 164:9, 164:14, 170:21, 182:20, 188:4 30,000-foot [1] - 121:4 30,000-foot-view [1] - 104:10 3100 [2] - 6:5, 6:12 316 [1] - 2:13 32,000 [2] - 17:1, 17:2 32502 [1] - 2:14 342,000 [1] - 72:24 350 [1] - 21:14 36 [1] - 129:19 37 [1] - 103:1 3843 [1] - 5:14 3:00 [1] - 171:24 3:17-cv-01362 [2] - 1:5, 238:8 3:17-cv-01665 [2] - 1:11, 238:8 3:30 [1] - 171:25	4 4 [5] - 47:10, 101:25, 102:9, 197:2, 197:8 4.8 [1] - 73:12 40 [2] - 46:7, 71:15 40,000 [2] - 92:10, 92:14 401 [2] - 2:10, 4:6 405 [1] - 2:7 42 [1] - 93:19 43,728 [1] - 96:6 43225 [1] - 20:8 44711 [6] - 32:11, 47:10, 47:21, 51:15, 102:17, 103:15 44711_28 [2] - 150:8, 150:11 44758 [1] - 76:14 44759 [1] - 70:18 44759-A [1] - 70:16 45 [3] - 77:6, 147:5, 147:6 45% [1] - 61:19	5 5 [1] - 172:18

5.2 [1] - 224:15 50 [3] - 18:3, 43:10, 71:15 50,000 [5] - 22:5, 22:19, 22:20, 22:21, 96:7 50-page [1] - 86:2 500 [1] - 86:13 55 [1] - 149:2 553 [1] - 6:8 56 [1] - 3:4 56th [1] - 3:5 57,000 [3] - 93:19, 114:11, 115:20 57.09 [1] - 104:18 583,000 [1] - 26:13 5:06 [1] - 237:19	90% [1] - 159:11 901 [1] - 4:18 90s [1] - 170:9 91436 [1] - 3:18 95 [1] - 151:11 98 [1] - 151:11 98% [1] - 151:7 980,649,200 [1] - 106:5 99-something [1] - 122:19 99.55% [1] - 61:13 99.9% [1] - 94:6 999 [1] - 122:23 9:00 [2] - 7:4, 237:18 9:46 [1] - 35:20 9th [1] - 2:10	25:24, 50:12, 75:11, 75:25, 169:12 accessed [1] - 49:24 accommodate [1] - 35:13 accompanying [1] - 126:13 According [4] - 26:10, 27:6, 27:10, 30:3 according [14] - 24:23, 26:15, 27:17, 27:22, 38:5, 40:1, 46:20, 51:18, 54:16, 63:24, 64:24, 119:1, 155:10, 184:1 account [8] - 61:18, 112:17, 114:12, 116:1, 177:25, 206:4, 206:5, 206:8 accounted [1] - 119:18 accounts [1] - 225:12 accuracy [2] - 40:17, 95:15 accurate [8] - 81:22, 108:8, 128:15, 128:16, 132:24, 133:7, 138:18, 159:24 accurately [5] - 39:2, 93:22, 156:2, 231:16, 233:4 ABDC [7] - 20:9, 20:11, 33:24, 42:17, 57:12, 90:22, 214:3 ABDC's [1] - 233:3 ABDC-MDL [1] - 214:3 ability [4] - 9:12, 9:13, 88:15, 201:21 able [16] - 7:20, 9:10, 11:20, 83:2, 89:6, 91:16, 92:15, 98:14, 121:15, 121:16, 122:12, 131:10, 169:6, 169:23, 169:25, 182:21 absence [2] - 39:1, 102:10 absolutely [3] - 86:5, 89:9, 146:2 abuse [14] - 155:1, 155:5, 155:7, 155:16, 173:23, 193:5, 193:21, 194:1, 194:9, 215:1, 215:6, 215:10, 218:7, 218:8 Abuse [1] - 156:4 abused [1] - 193:17 accelerated [1] - 87:18 accepted [2] - 155:20, 155:21 access [6] - 25:21,	229:14, 229:18 advance [1] - 169:10 adversarial [2] - 230:25, 231:3 Adversarial [1] - 231:2 adverse [3] - 174:13, 174:18, 182:4 advice [1] - 97:15 advising [3] - 197:17, 198:1, 198:10 Affairs [10] - 91:15, 128:9, 128:15, 128:25, 129:6, 129:9, 130:4, 148:10, 194:4, 231:13 affect [3] - 119:8, 119:23, 201:9 affected [3] - 111:4, 111:7, 111:16 affects [2] - 200:25 afternoon [5] - 90:22, 106:10, 128:2, 128:4, 153:12 age [1] - 204:11 Agency [3] - 177:12, 182:24, 212:7 agency [2] - 181:7 agent [2] - 8:13, 144:20 agents [1] - 171:16 aggregate [3] - 46:15, 47:2, 119:9 aggressive [1] - 104:22 ago [9] - 22:15, 61:6, 82:23, 148:14, 166:1, 169:2, 190:19, 194:22 agree [47] - 17:4, 17:9, 43:14, 47:1, 49:6, 51:16, 88:8, 90:17, 114:18, 117:12, 119:11, 119:15, 125:19, 151:23, 152:8, 155:2, 155:17, 155:22, 156:6, 157:17, 158:5, 158:7, 172:17, 180:21, 182:14, 184:6, 185:1, 186:9, 202:11, 202:22, 203:15, 215:9, 216:7, 216:19, 217:1, 217:5, 217:19, 218:11, 219:3, 219:4, 219:5, 220:17, 221:4, 221:8, 228:5, 234:9,
6	A		
7			
8			
9			

237:6 agreed [16] - 58:12, 79:1, 133:15, 141:15, 153:22, 155:1, 155:5, 158:18, 159:17, 160:15, 165:22, 167:3, 168:22, 169:23, 176:21, 232:9 Agreed [12] - 176:18, 176:22, 177:8, 184:11, 184:15, 206:3, 225:8, 227:22, 229:11, 232:23, 233:14, 235:3 agreement [21] - 163:16, 165:9, 175:23, 175:25, 176:14, 176:17, 177:13, 190:15, 225:23, 226:11, 226:15, 227:21, 227:25, 228:10, 228:12, 229:11, 229:23, 231:16, 234:10, 235:5, 235:22 Agreement [1] - 226:4 agrees [3] - 191:4, 191:16, 228:2 ahead [14] - 11:9, 67:21, 72:9, 75:16, 85:9, 85:10, 85:16, 95:10, 131:18, 172:5, 182:8, 183:4, 191:2 Aid [3] - 12:22, 15:25, 19:13 aiming [1] - 97:20 al [4] - 1:7, 1:13, 238:6, 238:7 Alabama [2] - 108:18, 109:7 aleck [1] - 160:6 alert [2] - 180:10, 236:15 allegation [6] - 223:22, 223:25, 224:4, 224:7, 224:19, 224:20 allegations [2] - 222:16, 225:4 allow [4] - 72:8, 82:25, 126:9, 160:3 allowed [3] - 69:24, 96:17, 200:6 allows [1] - 124:1 almost [8] - 31:12,	31:16, 31:23, 32:10, 45:25, 71:5, 105:8, 123:15 alone [2] - 117:13, 234:7 aloud [2] - 157:12, 184:10 alternatively [1] - 101:20 America [8] - 74:11, 75:10, 158:22, 167:24, 193:6, 193:17, 227:16, 228:5 American [3] - 157:16, 158:2, 217:17 Amerisource [1] - 150:23 AMERISOURCEBER GEN [2] - 1:7, 1:13 AmerisourceBergen [104] - 6:2, 27:11, 29:2, 31:13, 31:24, 32:22, 33:13, 42:23, 58:4, 67:7, 85:22, 93:13, 115:15, 115:18, 115:19, 115:20, 116:23, 116:25, 117:2, 117:6, 124:20, 128:6, 128:11, 129:1, 129:19, 130:12, 130:22, 131:4, 132:15, 132:25, 133:8, 134:21, 141:10, 144:19, 148:23, 149:8, 150:14, 151:24, 152:9, 155:4, 158:20, 160:18, 161:25, 164:12, 164:17, 164:25, 165:21, 166:12, 168:1, 168:12, 168:17, 168:21, 175:3, 175:11, 175:19, 176:13, 177:1, 177:7, 181:4, 181:22, 182:10, 182:14, 182:22, 186:9, 188:6, 190:9, 192:4, 193:1, 194:5, 195:24, 197:17, 198:1, 198:11, 202:6, 203:21, 203:25, 204:5, 204:11, 205:10, 210:2, 211:13, 212:7, 212:17,	213:10, 215:10, 221:9, 221:14, 222:13, 223:3, 223:22, 224:6, 224:14, 224:23, 226:6, 226:15, 227:11, 227:25, 228:2, 229:8, 230:15, 231:15, 232:9, 234:11, 238:6 AmerisourceBergen' s [6] - 30:3, 30:10, 162:16, 167:11, 199:7, 214:9 amount [11] - 9:19, 30:10, 30:11, 37:3, 45:2, 45:5, 45:11, 66:18, 77:24, 91:17, 177:21 amounted [1] - 119:18 analogous [1] - 72:23 analyses [5] - 10:10, 28:21, 81:14, 81:16, 118:24 Analysis [1] - 8:14 analysis [38] - 10:6, 23:23, 24:1, 24:12, 24:18, 24:23, 27:16, 27:21, 31:8, 31:19, 32:2, 36:10, 39:10, 42:10, 42:25, 43:3, 43:19, 44:6, 44:11, 49:2, 53:5, 53:25, 54:19, 54:24, 63:24, 64:24, 66:12, 68:3, 88:25, 112:3, 113:2, 114:2, 117:2, 117:11, 117:12, 123:25, 124:18, 124:23 analytical [10] - 107:17, 107:18, 107:25, 108:2, 108:3, 108:6, 108:13, 108:14, 108:17, 109:2 analyze [6] - 10:15, 10:20, 67:2, 67:12, 67:23, 113:9 analyzed [4] - 42:21, 55:5, 55:13, 65:20 ANDREW [1] - 5:10 ANNE [1] - 4:2 ANNIE [1] - 3:14 annually [2] - 131:6, 131:9 Answer [1] - 193:10 answer [35] - 28:7, 42:2, 42:12, 44:24, 53:21, 58:24, 59:10,	59:11, 64:5, 65:6, 67:21, 72:8, 72:9, 95:11, 130:5, 160:2, 162:15, 163:14, 164:18, 165:15, 165:17, 167:22, 172:15, 175:22, 175:24, 176:2, 176:7, 181:19, 182:7, 183:3, 183:5, 184:22, 185:13, 209:12 answering [1] - 95:16 answers [4] - 70:3, 106:5, 110:18, 205:15 ANTHONY [1] - 2:6 anti [1] - 59:22 anti-diversion [1] - 59:22 apologize [7] - 58:12, 71:19, 110:18, 138:20, 146:22, 153:17, 233:20 appear [5] - 32:8, 39:9, 46:4, 49:17, 118:19 APPEARANCES [6] - 2:1, 3:1, 5:1, 5:6, 6:1, 6:10 appeared [3] - 38:19, 61:23, 77:19 appendices [1] - 28:13 Appendix [4] - 24:7, 27:1, 39:24, 40:10 appendix [3] - 40:6, 40:9, 227:20 applicable [1] - 187:13 applied [1] - 81:4 applies [3] - 131:2, 186:13, 187:16 apply [7] - 37:16, 66:18, 81:3, 93:2, 125:5, 186:1, 228:4 appreciate [5] - 23:8, 78:15, 83:16, 89:10, 154:5 appreciating [1] - 85:20 approach [12] - 8:1, 68:12, 82:22, 101:6, 157:2, 181:15, 194:14, 211:8,
--	---	--	---

<p>124:11, 203:20 arise [1] - 87:3 arises [1] - 87:5 arrested [1] - 66:22 arrived [1] - 62:8 articulate [2] - 104:4, 110:6 articulated [1] - 39:5 Ashley [1] - 171:17 ASHLEY [1] - 5:3 aspect [2] - 183:16, 189:25 asserted [3] - 51:24, 52:11, 211:1 assigned [1] - 142:12 assignment [1] - 39:11 assist [1] - 95:6 assistant [1] - 213:1 assume [3] - 95:21, 185:23, 227:23 assumes [1] - 95:17 assuming [1] - 63:21 AT [1] - 1:2 attached [1] - 69:14 attempted [2] - 79:20, 91:25 attend [1] - 195:19 attention [2] - 30:2, 32:20 Attorney [2] - 100:18, 170:4 attorney [5] - 229:1, 229:2, 230:11, 230:12, 230:21 Attorney's [1] - 230:22 Attorneys [2] - 230:15, 230:18 attorneys' [1] - 101:18 Auburn [1] - 65:4 audited [1] - 161:6 augment [2] - 39:12, 39:21 August [6] - 96:7, 128:19, 224:14, 235:6, 235:7, 236:2 authenticity [1] - 93:1 authorities [1] - 181:9 authority [4] - 161:18, 161:22, 217:8, 217:9 authorized [1] - 158:10 authorizes [1] - 45:5 automated [2] - 186:25, 232:12 available [14] - 28:10, 46:16, 49:21, 50:7, 50:13, 51:3, 52:21, 76:3, 76:9, 78:3, 79:24, 80:5, 162:8</p>	<p>average [36] - 10:11, 10:12, 10:16, 10:17, 10:23, 15:9, 15:17, 15:20, 15:22, 16:16, 16:17, 16:21, 16:22, 17:8, 17:10, 17:12, 17:13, 17:17, 17:20, 18:12, 18:18, 18:20, 18:22, 19:17, 19:19, 19:21, 19:23, 19:25, 19:27, 19:29, 19:31, 19:33, 19:35, 19:37, 19:39, 19:41, 19:43, 19:45, 19:47, 19:49, 19:51, 19:53, 19:55, 19:57, 19:59, 19:61, 19:63, 19:65, 19:67, 19:69, 19:71, 19:73, 19:75, 19:77, 19:79, 19:81, 19:83, 19:85, 19:87, 19:89, 19:91, 19:93, 19:95, 19:97, 19:99, 19:101, 19:103, 19:105, 19:107, 19:109, 19:111, 19:113, 19:115, 19:117, 19:119, 19:121, 19:123, 19:125, 19:127, 19:129, 19:131, 19:133, 19:135, 19:137, 19:139, 19:141, 19:143, 19:145, 19:147, 19:149, 19:151, 19:153, 19:155, 19:157, 19:159, 19:161, 19:163, 19:165, 19:167, 19:169, 19:171, 19:173, 19:175, 19:177, 19:179, 19:181, 19:183, 19:185, 19:187, 19:189, 19:191, 19:193, 19:195, 19:197, 19:199, 19:201, 19:203, 19:205, 19:207, 19:209, 19:211, 19:213, 19:215, 19:217, 19:219, 19:221, 19:223, 19:225, 19:227, 19:229, 19:231, 19:233, 19:235, 19:237, 19:239, 19:241, 19:243, 19:245, 19:247, 19:249, 19:251, 19:253, 19:255, 19:257, 19:259, 19:261, 19:263, 19:265, 19:267, 19:269, 19:271, 19:273, 19:275, 19:277, 19:279, 19:281, 19:283, 19:285, 19:287, 19:289, 19:291, 19:293, 19:295, 19:297, 19:299, 19:301, 19:303, 19:305, 19:307, 19:309, 19:311, 19:313, 19:315, 19:317, 19:319, 19:321, 19:323, 19:325, 19:327, 19:329, 19:331, 19:333, 19:335, 19:337, 19:339, 19:341, 19:343, 19:345, 19:347, 19:349, 19:351, 19:353, 19:355, 19:357, 19:359, 19:361, 19:363, 19:365, 19:367, 19:369, 19:371, 19:373, 19:375, 19:377, 19:379, 19:381, 19:383, 19:385, 19:387, 19:389, 19:391, 19:393, 19:395, 19:397, 19:399, 19:401, 19:403, 19:405, 19:407, 19:409, 19:411, 19:413, 19:415, 19:417, 19:419, 19:421, 19:423, 19:425, 19:427, 19:429, 19:431, 19:433, 19:435, 19:437, 19:439, 19:441, 19:443, 19:445, 19:447, 19:449, 19:451, 19:453, 19:455, 19:457, 19:459, 19:461, 19:463, 19:465, 19:467, 19:469, 19:471, 19:473, 19:475, 19:477, 19:479, 19:481, 19:483, 19:485, 19:487, 19:489, 19:491, 19:493, 19:495, 19:497, 19:499, 19:501, 19:503, 19:505, 19:507, 19:509, 19:511, 19:513, 19:515, 19:517, 19:519, 19:521, 19:523, 19:525, 19:527, 19:529, 19:531, 19:533, 19:535, 19:537, 19:539, 19:541, 19:543, 19:545, 19:547, 19:549, 19:551, 19:553, 19:555, 19:557, 19:559, 19:561, 19:563, 19:565, 19:567, 19:569, 19:571, 19:573, 19:575, 19:577, 19:579, 19:581, 19:583, 19:585, 19:587, 19:589, 19:591, 19:593, 19:595, 19:597, 19:599, 19:601, 19:603, 19:605, 19:607, 19:609, 19:611, 19:613, 19:615, 19:617, 19:619, 19:621, 19:623, 19:625, 19:627, 19:629, 19:631, 19:633, 19:635, 19:637, 19:639, 19:641, 19:643, 19:645, 19:647, 19:649, 19:651, 19:653, 19:655, 19:657, 19:659, 19:661, 19:663, 19:665, 19:667, 19:669, 19:671, 19:673, 19:675, 19:677, 19:679, 19:681, 19:683, 19:685, 19:687, 19:689, 19:691, 19:693, 19:695, 19:697, 19:699, 19:701, 19:703, 19:705, 19:707, 19:709, 19:711, 19:713, 19:715, 19:717, 19:719, 19:721, 19:723, 19:725, 19:727, 19:729, 19:731, 19:733, 19:735, 19:737, 19:739, 19:741, 19:743, 19:745, 19:747, 19:749, 19:751, 19:753, 19:755, 19:757, 19:759, 19:761, 19:763, 19:765, 19:767, 19:769, 19:771, 19:773, 19:775, 19:777, 19:779, 19:781, 19:783, 19:785, 19:787, 19:789, 19:791, 19:793, 19:795, 19:797, 19:799, 19:801, 19:803, 19:805, 19:807, 19:809, 19:811, 19:813, 19:815, 19:817, 19:819, 19:821, 19:823, 19:825, 19:827, 19:829, 19:831, 19:833, 19:835, 19:837, 19:839, 19:841, 19:843, 19:845, 19:847, 19:849, 19:851, 19:853, 19:855, 19:857, 19:859, 19:861, 19:863, 19:865, 19:867, 19:869, 19:871, 19:873, 19:875, 19:877, 19:879, 19:881, 19:883, 19:885, 19:887, 19:889, 19:891, 19:893, 19:895, 19:897, 19:899, 19:901, 19:903, 19:905, 19:907, 19:909, 19:911, 19:913, 19:915, 19:917, 19:919, 19:921, 19:923, 19:925, 19:927, 19:929, 19:931, 19:933, 19:935, 19:937, 19:939, 19:941, 19:943, 19:945, 19:947, 19:949, 19:951, 19:953, 19:955, 19:957, 19:959, 19:961, 19:963, 19:965, 19:967, 19:969, 19:971, 19:973, 19:975, 19:977, 19:979, 19:981, 19:983, 19:985, 19:987, 19:989, 19:991, 19:993, 19:995, 19:997, 19:999, 19:1001, 19:1003, 19:1005, 19:1007, 19:1009, 19:1011, 19:1013, 19:1015, 19:1017, 19:1019, 19:1021, 19:1023, 19:1025, 19:1027, 19:1029, 19:1031, 19:1033, 19:1035, 19:1037, 19:1039, 19:1041, 19:1043, 19:1045, 19:1047, 19:1049, 19:1051, 19:1053, 19:1055, 19:1057, 19:1059, 19:1061, 19:1063, 19:1065, 19:1067, 19:1069, 19:1071, 19:1073, 19:1075, 19:1077, 19:1079, 19:1081, 19:1083, 19:1085, 19:1087, 19:1089, 19:1091, 19:1093, 19:1095, 19:1097, 19:1099, 19:1101, 19:1103, 19:1105, 19:1107, 19:1109, 19:1111, 19:1113, 19:1115, 19:1117, 19:1119, 19:1121, 19:1123, 19:1125, 19:1127, 19:1129, 19:1131, 19:1133, 19:1135, 19:1137, 19:1139, 19:1141, 19:1143, 19:1145, 19:1147, 19:1149, 19:1151, 19:1153, 19:1155, 19:1157, 19:1159, 19:1161, 19:1163, 19:1165, 19:1167, 19:1169, 19:1171, 19:1173, 19:1175, 19:1177, 19:1179, 19:1181, 19:1183, 19:1185, 19:1187, 19:1189, 19:1191, 19:1193, 19:1195, 19:1197, 19:1199, 19:1201, 19:1203, 19:1205, 19:1207, 19:1209, 19:1211, 19:1213, 19:1215, 19:1217, 19:1219, 19:1221, 19:1223, 19:1225, 19:1227, 19:1229, 19:1231, 19:1233, 19:1235, 19:1237, 19:1239, 19:1241, 19:1243, 19:1245, 19:1247, 19:1249, 19:1251, 19:1253, 19:1255, 19:1257, 19:1259, 19</p>
--	--

brand [1] - 235:17	138:25	50:12, 52:2, 52:4, 52:5, 52:8, 52:15, 52:19, 52:24, 53:4, 53:6, 53:8, 54:8, 54:20, 54:25, 55:5, 56:3, 56:9, 56:10, 57:3, 57:20, 57:23, 58:10, 58:20, 59:5, 59:24, 60:12, 60:19, 60:25, 61:10, 61:14, 61:20, 61:25, 62:6, 62:8, 62:14, 64:1, 64:16, 65:1, 65:2, 65:6, 67:25, 68:5, 68:19, 68:20, 69:8, 69:12, 69:14, 69:15, 69:19, 70:8, 78:16, 78:17, 79:7, 79:21, 100:6, 100:8, 104:12, 104:23, 105:24, 106:6, 110:24, 111:5, 111:23, 112:2, 112:11, 115:3, 115:24, 116:10, 119:20, 122:25, 126:21, 129:21, 130:12, 131:3, 149:15, 149:17, 149:24, 167:13, 168:16, 173:6, 173:15, 174:15, 174:20, 174:24, 205:11, 208:5, 208:7, 208:9	calculations [9] - 24:2, 24:7, 24:13, 29:23, 50:25, 52:1, 52:3, 118:16, 123:7 calculator [3] - 22:23, 22:24, 94:1 CALLAS [1] - 6:7 camera [1] - 132:12 CAMPBELL [1] - 6:14 cannot [5] - 45:15, 45:19, 85:22, 117:12, 233:1 cap [2] - 69:10, 103:1 capacity [2] - 145:18, 164:1 capita [12] - 10:6, 29:24, 50:22, 50:25, 51:2, 51:6, 51:17, 52:1, 116:7, 117:11, 117:12, 117:17 Capitol [1] - 2:7 captured [1] - 147:22 Cardinal [85] - 4:11, 5:2, 21:7, 23:19, 24:25, 25:3, 25:7, 25:20, 25:23, 27:11, 29:3, 30:7, 30:12, 31:17, 31:25, 32:3, 32:12, 32:14, 32:21, 33:13, 33:17, 33:21, 34:4, 34:8, 34:16, 35:1, 36:24, 37:2, 37:23, 37:25, 38:8, 38:10, 38:19, 38:23, 39:3, 41:24, 42:6, 42:10, 42:12, 42:14, 42:23, 44:1, 55:1, 55:5, 55:13, 57:8, 57:17, 57:18, 57:24, 58:9, 58:21, 60:22, 61:4, 61:12, 61:14, 61:15, 61:20, 61:24, 62:4, 62:7, 63:22, 63:24, 64:22, 64:24, 65:4, 65:8, 65:11, 67:8, 85:23, 114:22, 114:25, 115:2, 115:5, 115:10, 115:16, 115:21, 117:21, 123:18, 123:21, 123:22, 123:24, 125:2, 159:3, 210:21 Cardinal's [5] - 34:12, 41:24, 41:25, 42:6, 42:7 Care [10] - 26:9, 26:11, 26:15, 26:17, 26:21, 27:3, 27:6, 27:10, 27:17, 27:23	care [8] - 104:15, 105:2, 105:4, 152:1, 201:1, 201:9, 204:18, 207:25 careful [1] - 84:17 Carey [1] - 4:17 cart [2] - 85:5, 85:7 Carter [1] - 208:10 case [46] - 8:21, 10:22, 23:23, 27:22, 39:11, 44:1, 44:4, 46:3, 51:14, 58:11, 59:18, 60:14, 60:16, 60:20, 60:25, 74:21, 80:14, 84:7, 89:23, 97:1, 99:20, 100:14, 100:15, 116:22, 117:14, 119:17, 121:15, 163:19, 164:13, 167:3, 167:17, 168:2, 168:7, 168:17, 170:18, 173:13, 183:22, 198:17, 198:21, 199:7, 199:10, 199:11, 199:13, 199:15, 204:20, 236:21 cases [4] - 12:3, 60:15, 100:18, 148:2 cast [1] - 135:4 catch-22 [1] - 86:9 categories [5] - 100:23, 104:5, 120:24, 121:16, 152:19 categorize [1] - 233:16 Cathy [3] - 140:23, 140:24, 141:1 caught [1] - 143:15 causation [1] - 185:8 caused [1] - 89:7 causing [1] - 169:20 CC2 [1] - 78:16 CDC [1] - 118:21 Census [4] - 52:5, 117:15, 117:18, 117:24 center [26] - 61:9, 61:16, 61:23, 62:10, 62:13, 62:16, 63:7, 63:23, 63:25, 64:23, 140:17, 140:19, 141:17, 141:23, 142:1, 142:5, 142:12, 148:5, 176:17, 177:1, 186:5, 213:19, 227:16, 232:10,
	C			
C.F.R [3] - 183:13, 202:16, 202:21	calculate [3] - 22:22, 122:9, 122:12	calculating [2] - 104:22, 115:13		
CA [1] - 3:18	calculated [8] - 40:17, 40:19, 40:23, 41:5, 51:1, 105:22, 118:8, 118:13	calculation [4] - 50:21, 102:14, 103:19, 121:17		
Cabell [123] - 3:2, 15:18, 15:22, 16:13, 19:25, 20:1, 20:6, 20:21, 21:14, 23:24, 24:4, 25:1, 25:9, 26:4, 26:18, 29:25, 30:4, 30:25, 31:9, 32:13, 33:2, 34:25, 36:8, 36:12, 36:15, 37:22, 38:9, 43:25, 44:10, 48:15, 48:19, 48:24, 49:4, 50:10,				

233:1	60:9, 110:13, 111:11, 116:4, 151:16, 177:9, 177:10, 188:13, 210:17	47:11, 49:9, 49:19, 50:20, 55:10, 55:11, 55:15, 62:12, 70:20, 70:22, 71:12, 74:23, 75:5, 76:18, 76:24, 77:6, 82:18, 86:21, 87:1, 90:12, 90:24, 91:2, 91:4, 92:21, 93:20, 93:21, 93:24, 98:11, 98:15, 98:18, 99:11, 102:24, 106:24, 112:8, 117:11, 120:8, 120:11, 126:11, 132:21, 146:15, 150:11	173:9, 178:16, 218:24, 220:16, 220:25
center's [1] - 222:13	changes [13] - 28:18, 40:2, 40:11, 40:13, 73:25, 106:22, 111:14, 111:15, 112:5, 115:9, 177:15, 192:19	cities [1] - 167:24 citing [2] - 199:6, 199:11	closed-door [5] - 104:3, 104:6, 104:16, 104:19, 105:5
centers [30] - 61:18, 62:20, 62:24, 63:2, 140:12, 140:15, 140:18, 140:21, 141:3, 141:15, 145:22, 147:15, 148:3, 148:7, 148:22, 149:7, 149:11, 149:24, 150:12, 172:19, 172:21, 186:2, 186:14, 187:3, 187:4, 189:8, 213:13, 222:9, 227:18, 227:20	changing [3] - 29:5, 30:16, 99:13	City [26] - 4:1, 5:11, 15:22, 16:12, 20:5, 23:25, 24:5, 50:11, 52:11, 56:4, 56:9, 56:10, 59:5, 62:9, 62:14, 64:16, 65:2, 65:7, 100:8, 111:23, 112:1, 112:11, 115:3, 116:10, 173:15, 238:5	closely [3] - 147:20, 148:20
centimeters [1] - 122:7	channels [3] - 198:9, 198:14, 218:23	city [7] - 63:11, 149:4, 150:4, 173:12, 173:15, 173:17	closer [1] - 21:13
certain [5] - 30:15, 40:13, 45:5, 92:2, 130:19	chapter [1] - 157:14	CITY [1] - 1:4	closing [1] - 158:13
certainly [3] - 22:14, 88:1, 89:10	characteristics [1] - 224:16	Civil [3] - 1:4, 238:7, 238:8	Cochran [3] - 6:17, 238:2, 238:11
CERTIFICATION [1] - 238:1	characterization [4] - 44:25, 56:18, 71:24, 75:9	civil [1] - 1:10	Code [12] - 142:23, 146:4, 146:17, 147:1, 155:12, 158:9, 162:6, 178:11, 180:9, 233:15, 236:14, 237:9
certify [1] - 238:4	characterize [1] - 168:23	claim [1] - 69:11	code [12] - 10:10, 10:11, 50:2, 70:20, 99:4, 99:5, 106:25, 108:19, 115:1, 115:5, 115:7, 233:22
CFR [2] - 161:3, 178:13	characterizing [1] - 205:16	claiming [1] - 52:12	coded [1] - 114:16
chain [39] - 15:6, 29:1, 30:18, 30:21, 34:23, 35:4, 44:16, 62:13, 94:11, 103:2, 103:6, 103:7, 103:16, 103:18, 103:25, 104:7, 104:11, 104:18, 104:23, 105:10, 105:11, 105:12, 105:25, 131:22, 132:5, 132:16, 132:24, 133:14, 134:13, 134:22, 142:9, 142:11, 145:7, 153:19, 162:24, 216:18, 216:20, 236:7, 236:11	characters [1] - 135:5	clarify [1] - 55:12	codes [5] - 48:14, 48:19, 50:14, 109:19, 113:24
challenges [1] - 95:14	charge [6] - 141:1, 142:4, 142:7, 142:12, 143:6, 145:22	clarity [2] - 150:7, 154:5	coefficient [10] - 121:1, 121:3, 121:11, 121:17, 122:1, 122:3, 122:10, 122:11, 122:13, 122:16
chance [1] - 228:22	CHARLES [1] - 3:11	classes [1] - 154:2	cold [1] - 97:9
change [11] - 92:9, 106:2, 116:8, 116:11, 139:7, 177:4, 201:25, 221:18, 221:20, 231:6	Charleston [7] - 2:8, 3:13, 4:19, 5:15, 6:9, 7:3, 149:20	classic [2] - 82:16	collaborative [1] - 230:25
changed [10] - 28:22,	CHARLESTON [2] - 1:2, 1:18	classification [1] - 28:5	colloquy [1] - 170:11
	chart [60] - 13:5, 13:7, 13:19, 16:7, 21:6, 26:10, 26:15, 27:2, 27:6, 27:10, 29:21, 30:3, 31:8, 31:19, 32:19, 36:10, 47:1, 47:16, 47:22, 48:2, 48:11, 48:17, 51:18, 53:4, 53:7, 55:23, 55:24, 56:22, 61:4, 61:5, 61:12, 61:22, 63:21, 64:22, 71:20, 72:25, 82:13, 85:23, 91:7, 93:7, 93:8, 93:11, 94:16, 94:22, 94:23, 95:13, 99:12, 99:13, 99:16, 117:5, 118:4, 133:3, 134:16, 135:23, 145:19, 150:9, 151:6	cleared [2] - 233:7, 233:9	color [3] - 88:9, 134:12, 139:7
	charts [52] - 8:24, 9:2, 16:12, 24:6, 28:17, 30:24, 31:4, 35:8, 36:6, 43:19, 47:5,	clearing [1] - 205:11	Columbus [2] - 150:1, 150:5
		clearly [2] - 32:9, 69:18	combat [1] - 215:25
		CLERK [3] - 127:14, 127:17, 127:19	combination [2] - 37:11, 154:21
		clerks [1] - 97:16	combined [1] - 150:23
		Clifford [2] - 136:18, 211:15	comfortable [3] - 87:22, 178:20, 180:25
		circle [3] - 102:16, 141:6, 142:24	coming [14] - 12:2, 31:12, 31:17, 31:24, 69:8, 69:11, 108:4, 108:5, 108:17, 149:1, 150:25, 151:7, 201:3, 208:7
		circled [2] - 102:25, 150:15	command [14] - 130:17, 131:22,
		Circuit [2] - 89:23, 101:10	
		Circuit's [1] - 102:1	
		circulate [1] - 213:16	
		circulating [1] - 194:17	
		circumstance [1] - 236:16	
		circumstances [5] -	
		closed [15] - 104:3, 104:6, 104:16, 104:19, 105:5,	

132:6, 132:16, 132:24, 133:14, 134:13, 134:22, 135:19, 136:7, 142:9, 142:12, 145:7, 145:15 commentary [1] - 153:15 comments [1] - 80:23 commercial [1] - 214:19 COMMISSION [1] - 1:10 Commission [2] - 2:2, 3:2 Commissioners [1] - 50:12 commit [1] - 84:21 committed [3] - 87:19, 102:7, 102:11 Committee [1] - 99:22 common [1] - 100:3 commonality [3] - 19:2, 19:7, 21:24 communicate [4] - 80:24, 203:3, 231:19, 231:22 communicating [2] - 168:20, 202:6 communication [6] - 170:3, 199:25, 212:6, 228:14, 229:8, 235:13 communications [2] - 8:18, 168:24 communities [3] - 175:4, 175:12, 206:9 community [6] - 177:18, 185:2, 203:22, 204:2, 204:7, 206:2 companies [2] - 149:1, 159:6 company [15] - 87:14, 91:17, 136:22, 137:19, 137:20, 140:9, 141:8, 147:5, 148:14, 164:10, 165:21, 169:2, 181:6, 201:23, 225:13 Company [1] - 128:6 compare [5] - 17:7, 17:8, 34:9, 67:16, 182:21 compared [1] - 172:12 comparing [3] - 10:22, 39:18, 121:12 comparison [2] - 17:24, 121:18	compartments [1] - 92:11 compensation [1] - 99:20 compiling [2] - 27:16, 27:21 complained [1] - 168:19 complaint [1] - 171:21 complete [4] - 39:9, 79:1, 81:19, 235:19 completed [1] - 235:16 completely [3] - 35:25, 141:24, 186:25 completeness [1] - 17:22 completion [1] - 235:10 complex [1] - 144:24 compliance [2] - 56:16, 228:2 Compliance [5] - 129:10, 129:14, 140:13, 141:20, 141:21 complicated [1] - 95:20 comply [4] - 182:15, 184:5, 184:8, 221:11 component [2] - 172:15, 216:20 components [2] - 91:25, 216:17 composite [1] - 211:7 computation [1] - 121:12 computer [4] - 6:19, 70:20, 79:11, 99:7 computers [1] - 99:7 con [1] - 175:15 concede [1] - 219:7 concept [2] - 9:14, 180:3 conceptually [1] - 111:24 concern [3] - 86:22, 93:6, 93:14 concerned [4] - 88:3, 88:15, 89:18, 90:16 concerns [1] - 77:14 conclude [3] - 101:21, 102:5, 102:23 concluded [1] - 107:13 concluding [1] - 39:2 conclusion [3] - 102:13, 141:3, 185:5 conclusions [4] -	110:14, 111:10, 111:11, 111:17 conclusory [1] - 102:25 concrete [1] - 19:12 condition [1] - 216:3 conditional [1] - 87:22 conditionally [3] - 82:8, 83:19, 126:6 conditions [1] - 51:21 conduct [3] - 10:10, 118:22, 181:10 Conduct [1] - 227:8 conducted [1] - 225:10 conducts [1] - 136:10 confer [1] - 97:16 confident [1] - 111:10 confirm [2] - 96:19, 233:1 confirmed [1] - 235:1 confirming [1] - 41:9 conflict [1] - 219:2 confused [1] - 194:24 confusing [5] - 85:14, 85:15, 166:7, 166:8, 179:14 Congress [5] - 158:9, 158:10, 215:25, 216:23, 217:14 Congressional [2] - 193:25, 194:8 congressional [1] - 157:9 connect [1] - 69:14 Connolly [2] - 4:13, 5:4 CONROY [1] - 3:3 consequences [1] - 218:8 conservative [2] - 104:22, 104:25 consider [15] - 27:17, 27:22, 80:9, 80:17, 84:6, 85:17, 104:21, 172:14, 191:23, 192:18, 197:18, 203:21, 204:1, 204:5, 209:2 Consider [2] - 197:3, 197:9 considered [1] - 208:6 considering [2] - 106:21, 162:24 consistent [1] - 44:25 consolidate [1] - 149:4 consolidated [1] - 149:3 constantly [1] -	130:18 constitutes [1] - 80:11 constraints [1] - 71:16 constructing [1] - 106:23 construction [1] - 72:6 consult [1] - 135:13 consultant [5] - 135:12, 135:20, 139:18, 139:19, 144:23 consults [1] - 135:15 contact [2] - 231:12, 231:19 contacted [1] - 196:1 contacts [1] - 146:16 contain [7] - 74:24, 75:4, 75:5, 76:18, 78:19, 92:10 contained [1] - 132:17 contains [1] - 73:23 contemporaneous [1] - 115:17 contents [1] - 210:2 contest [1] - 134:20 context [4] - 126:23, 174:6, 175:16, 182:5 contexts [1] - 39:6 continually [1] - 192:6 continue [3] - 10:5, 80:12, 115:18 continued [1] - 225:6 Continued [5] - 3:1, 5:1, 5:6, 6:1, 6:10 continues [2] - 13:6, 170:2 contract [1] - 136:13 contrast [1] - 182:22 control [29] - 92:20, 137:8, 137:9, 147:23, 147:24, 148:1, 151:25, 152:3, 152:10, 160:25, 161:10, 162:23, 162:25, 163:2, 166:3, 175:20, 184:1, 186:1, 187:19, 188:25, 190:7, 191:6, 201:19, 201:22, 201:25, 212:8, 222:10, 233:25, 236:8 Control [12] - 137:2, 137:7, 145:20, 145:23, 146:6, 147:3, 147:10, 147:13, 147:17, 147:24, 169:8,	169:14 Controlled [14] - 67:14, 154:18, 154:25, 155:3, 155:10, 155:25, 156:16, 156:23, 158:8, 181:23, 182:11, 183:9, 184:10, 184:14 controlled [38] - 43:20, 43:21, 43:25, 44:16, 57:5, 57:19, 142:20, 148:23, 152:10, 153:24, 154:3, 154:6, 154:7, 154:9, 154:24, 157:9, 158:1, 172:7, 172:13, 172:18, 197:14, 197:20, 197:21, 198:8, 202:25, 203:11, 203:13, 214:21, 214:24, 215:7, 215:11, 216:2, 216:25, 217:16, 227:11, 227:12, 228:3 Controls [1] - 144:5 controls [18] - 146:25, 148:2, 152:17, 152:24, 152:25, 153:8, 154:2, 165:1, 191:8, 198:7, 198:12, 202:9, 202:11, 202:16, 203:1, 203:14, 220:10, 220:13 conversely [1] - 29:16 conversions [1] - 118:22 convert [1] - 92:20 converted [3] - 47:13, 47:24, 48:14 Cook [3] - 6:18, 238:3, 238:11 cooperated [1] - 169:13 copied [1] - 229:5 copies [2] - 194:17, 222:18 copy [2] - 12:12, 24:9 corner [4] - 9:6, 157:8, 197:4, 214:2 corporate [9] - 147:17, 147:23, 148:4, 185:21, 186:5, 187:5, 189:18, 189:19 Corporate [12] - 91:14, 128:8,
--	---	---	--	---

128:14, 128:25, 129:5, 129:9, 130:3, 136:6, 136:25, 148:9, 194:4, 231:13 cORPORATION [2] - 1:7, 1:13 Corporation [2] - 6:2, 238:7 correct [300] - 12:24, 13:10, 13:12, 15:4, 15:10, 15:14, 15:19, 16:5, 16:9, 17:17, 17:20, 24:16, 25:1, 25:5, 25:10, 25:15, 25:22, 25:25, 27:4, 27:8, 27:12, 28:15, 28:23, 29:9, 29:14, 29:19, 30:8, 30:18, 31:1, 31:4, 31:10, 31:14, 31:21, 32:8, 32:14, 32:23, 33:2, 33:6, 33:10, 33:14, 33:15, 33:19, 33:25, 34:10, 34:14, 34:17, 34:21, 36:12, 36:17, 36:22, 36:23, 36:25, 37:1, 37:9, 37:12, 37:24, 38:3, 38:6, 38:7, 38:11, 38:12, 38:16, 38:24, 38:25, 39:4, 39:5, 39:14, 39:15, 39:18, 39:19, 39:22, 40:3, 40:11, 40:12, 40:16, 40:21, 41:8, 41:10, 41:11, 41:15, 41:20, 42:1, 42:15, 42:16, 42:18, 42:20, 43:1, 43:5, 43:6, 43:17, 43:21, 43:23, 44:7, 44:8, 44:14, 44:17, 45:6, 45:17, 45:21, 45:23, 46:9, 46:12, 46:21, 47:14, 47:15, 48:9, 48:15, 48:25, 49:1, 49:11, 49:15, 49:22, 50:4, 50:8, 50:9, 50:14, 50:18, 51:4, 51:5, 51:7, 51:8, 51:22, 52:6, 52:7, 52:9, 52:20, 52:21, 53:8, 53:9, 53:18, 54:14, 54:22, 55:2, 55:6, 55:15, 55:16, 56:25, 57:6, 57:7, 57:11, 57:13, 57:15, 57:20, 58:5, 58:7, 61:6, 62:2, 62:6, 62:7, 62:17, 62:18, 62:21, 62:22, 62:25, 63:4, 63:5, 63:8,	63:10, 63:11, 64:1, 65:1, 65:10, 65:12, 65:13, 65:17, 65:18, 65:22, 65:23, 68:20, 71:6, 71:7, 71:10, 71:14, 72:23, 73:4, 73:6, 73:7, 73:10, 73:11, 73:12, 73:14, 73:19, 73:20, 73:25, 74:1, 75:11, 95:18, 101:1, 103:11, 103:12, 104:19, 104:20, 111:17, 114:1, 116:25, 117:1, 117:3, 117:4, 117:7, 117:8, 117:15, 118:16, 118:17, 118:19, 118:20, 118:22, 118:23, 119:1, 119:2, 119:10, 120:1, 120:14, 120:15, 123:12, 125:14, 128:12, 128:16, 129:3, 133:16, 133:20, 133:23, 135:6, 135:7, 135:15, 137:3, 138:4, 139:9, 139:23, 140:17, 140:21, 140:22, 141:16, 142:8, 142:10, 142:13, 142:15, 142:18, 142:21, 144:7, 145:4, 145:5, 152:1, 152:4, 152:11, 152:13, 153:20, 153:21, 154:10, 154:19, 154:23, 155:8, 158:12, 158:15, 158:19, 158:23, 158:24, 159:14, 159:15, 159:18, 160:16, 160:21, 162:19, 162:21, 163:8, 163:23, 170:5, 176:16, 177:5, 182:13, 189:3, 194:5, 194:6, 195:6, 195:8, 195:24, 198:3, 198:15, 199:4, 199:8, 200:4, 200:16, 201:18, 201:22, 206:7, 217:12, 221:1, 222:2, 224:25, 225:1, 225:23, 227:16, 227:18, 228:8, 229:6,	230:16, 232:18, 233:22, 234:10, 238:4 Correct [49] - 13:3, 13:11, 13:13, 13:16, 13:17, 15:15, 16:22, 17:14, 17:15, 17:18, 18:1, 18:13, 18:16, 19:1, 19:13, 19:16, 20:1, 20:13, 20:16, 21:1, 21:13, 21:16, 22:1, 22:13, 22:16, 23:1, 23:13, 23:16, 24:1, 24:13, 24:16, 25:1, 25:13, 25:16, 26:1, 26:13, 26:16, 27:1, 27:13, 27:16, 28:1, 28:13, 28:16, 29:1, 29:13, 29:16, 30:1, 30:13, 30:16, 31:1, 31:13, 31:16, 32:1, 32:13, 32:16, 33:1, 33:13, 33:16, 34:1, 34:13, 34:16, 35:1, 35:13, 35:16, 36:1, 36:13, 36:16, 37:1, 37:13, 37:16, 38:1, 38:13, 38:16, 39:1, 39:13, 39:16, 40:1, 40:13, 40:16, 41:1, 41:13, 41:16, 42:1, 42:13, 42:16, 43:1, 43:13, 43:16, 44:1, 44:13, 44:16, 45:1, 45:13, 45:16, 46:1, 46:13, 46:16, 47:1, 47:13, 47:16, 48:1, 48:13, 48:16, 49:1, 49:13, 49:16, 50:1, 50:13, 50:16, 51:1, 51:13, 51:16, 52:1, 52:13, 52:16, 53:1, 53:13, 53:16, 54:1, 54:13, 54:16, 55:1, 55:13, 55:16, 56:1, 56:13, 56:16, 57:1, 57:13, 57:16, 58:1, 58:13, 58:16, 59:1, 59:13, 59:16, 60:1, 60:13, 60:16, 61:1, 61:13, 61:16, 62:1, 62:13, 62:16, 63:1, 63:13, 63:16, 64:1, 64:13, 64:16, 65:1, 65:13, 65:16, 66:1, 66:13, 66:16, 67:1, 67:13, 67:16, 68:1, 68:13, 68:16, 69:1, 69:13, 69:16, 70:1, 70:13, 70:16, 71:1, 71:13, 71:16, 72:1, 72:13, 72:16, 73:1, 73:13, 73:16, 74:1, 74:13, 74:16, 75:1, 75:13, 75:16, 76:1, 76:13, 76:16, 77:1, 77:13, 77:16, 78:1, 78:13, 78:16, 79:1, 79:13, 79:16, 80:1, 80:13, 80:16, 81:1, 81:13, 81:16, 82:1, 82:13, 82:16, 83:1, 83:13, 83:16, 84:1, 84:13, 84:16, 85:1, 85:13, 85:16, 86:1, 86:13, 86:16, 87:1, 87:13, 87:16, 88:1, 88:13, 88:16, 89:1, 89:13, 89:16, 90:1, 90:13, 90:16, 91:1, 91:13, 91:16, 92:1, 92:13, 92:16, 93:1, 93:13, 93:16, 94:1, 94:13, 94:16, 95:1, 95:13, 95:16, 96:1, 96:13, 96:16, 97:1, 97:13, 97:16, 98:1, 98:13, 98:16, 99:1, 99:13, 99:16, 100:1, 100:13, 100:16, 101:1, 101:13, 101:16, 102:1, 102:13, 102:16, 103:1, 103:13, 103:16, 104:1, 104:13, 104:16, 105:1, 105:13, 105:16, 106:1, 106:13, 106:16, 107:1, 107:13, 107:16, 108:1, 108:13, 108:16, 109:1, 109:13, 109:16, 110:1, 110:13, 110:16, 111:1, 111:13, 111:16, 112:1, 112:13, 112:16, 113:1, 113:13, 113:16, 114:1, 114:13, 114:16, 115:1, 115:13, 115:16, 116:1, 116:13, 116:16, 117:1, 117:13, 117:16, 118:1, 118:13, 118:16, 119:1, 119:13, 119:16, 120:1, 120:13, 120:16, 121:1, 121:13, 121:16, 122:1, 122:13, 122:16, 123:1, 123:13, 123:16, 124:1, 124:13, 124:16, 125:1, 125:13, 125:16, 126:1, 126:13, 126:16, 127:1, 127:13, 127:16, 128:1, 128:13, 128:16, 129:1, 129:13, 129:16, 130:1, 130:13, 130:16, 131:1, 131:13, 131:16, 132:1, 132:13, 132:16, 133:1, 133:13, 133:16, 134:1, 134:13, 134:16, 135:1, 135:13, 135:16, 136:1, 136:13, 136:16, 137:1, 137:13, 137:16, 138:1, 138:13, 138:16, 139:1, 139:13, 139:16, 140:1, 140:13, 140:16, 141:1, 141:13, 141:16, 142:1, 142:13, 142:16, 143:1, 143:13, 143:16, 144:1, 144:13, 144:16, 145:1, 145:13, 145:16, 146:1, 146:13, 146:16, 147:1, 147:13, 147:16, 148:1, 148:13, 148:16, 149:1, 149:13, 149:16, 150:1, 150:13, 150:16, 151:1, 151:13, 151:16, 152:1, 152:13, 152:16, 153:1, 153:13, 153:16, 154:1, 154:13, 154:16, 155:1, 155:13, 155:16, 156:1, 156:13, 156:16, 157:1, 157:13, 157:16, 158:1, 158:13, 158:16, 159:1, 159:13, 159:16, 160:1, 160:13,
---	--	--

118:14, 119:4, 120:19, 123:10, 123:13, 124:8, 124:15, 125:4, 125:11, 125:17, 125:21, 125:25, 126:4, 127:1, 127:3, 127:10, 127:12, 127:15, 127:24, 129:25, 130:5, 130:9, 132:9, 133:5, 133:12, 134:6, 137:20, 146:19, 152:2, 153:16, 156:10, 156:13, 157:3, 157:22, 159:23, 160:2, 160:6, 165:5, 165:13, 165:16, 166:9, 166:15, 166:18, 166:21, 167:7, 171:10, 171:13, 171:23, 172:2, 172:5, 174:5, 175:6, 175:14, 176:2, 179:13, 179:16, 181:16, 182:6, 182:17, 182:25, 183:3, 184:19, 185:6, 185:9, 185:15, 188:1, 189:12, 190:11, 190:18, 191:2, 193:9, 196:10, 196:13, 196:16, 200:10, 203:8, 205:19, 205:22, 207:11, 208:24, 209:5, 209:9, 209:11, 209:14, 209:20, 209:23, 210:4, 210:12, 210:17, 210:21, 210:24, 211:9, 211:11, 221:4, 222:20, 223:16, 223:19, 226:1, 226:20, 226:24, 227:2, 228:18, 229:15, 229:18, 234:4, 234:15, 234:19, 237:13, 237:18	Court [36] - 6:17, 6:18, 7:2, 71:25, 77:22, 78:4, 79:24, 80:8, 80:15, 80:17, 80:19, 82:5, 82:7, 82:8, 82:10, 82:19, 87:16, 90:11, 95:3, 98:10, 98:14, 99:21, 100:5, 100:7, 101:10, 101:15, 101:17, 101:18, 102:5, 105:9, 117:5, 121:3, 198:17, 218:1, 238:2, 238:3 courtesy [1] - 229:5 courtesy-copied [1] - 229:5 courtroom [4] - 33:9, 43:11, 65:15, 88:14 COURTROOM [1] - 127:19 cover [4] - 101:10, 195:4, 210:11, 210:13 Covered [1] - 227:8 covered [6] - 42:25, 70:13, 104:9, 105:7, 117:25, 198:24 covers [1] - 227:10 Covington [1] - 5:11 Crab [1] - 16:18 crack [1] - 78:14 create [6] - 70:12, 70:20, 70:23, 98:15, 99:12, 104:7 created [8] - 41:12, 49:19, 70:19, 71:4, 78:6, 97:5, 219:12, 225:12 creates [1] - 99:8 credit [2] - 15:5, 115:20 credited [2] - 117:3, 117:6 criminal [1] - 202:15 crisis [2] - 170:1, 170:2 criteria [2] - 14:1, 55:20 critical [4] - 89:14, 89:22, 108:3, 217:14 cross [10] - 67:19, 68:25, 80:24, 81:13, 81:15, 82:25, 83:23, 88:10, 94:17, 114:9 CROSS [4] - 23:14, 116:20, 118:2, 119:5 crossing [1] - 20:1 Crow [5] - 133:24, 136:23, 136:24,	139:8 CRR [2] - 6:17, 6:18 crucial [1] - 84:7 CS [1] - 148:10 CSA [2] - 215:23, 215:25 CSR [2] - 185:25, 208:8 CSRA [40] - 129:1, 129:6, 129:12, 129:18, 132:25, 133:15, 134:21, 134:23, 135:14, 136:1, 137:25, 138:1, 141:12, 141:24, 142:12, 144:19, 145:23, 146:4, 146:16, 147:25, 148:12, 149:1, 152:21, 152:23, 158:10, 161:11, 161:17, 162:4, 162:18, 162:22, 163:13, 168:19, 168:25, 169:3, 169:5, 169:9, 169:12, 169:17,	38:15, 114:21 CVS's [1] - 38:11 D D.C [1] - 21:14 daily [1] - 192:7 dangerous [1] - 218:7 data [154] - 7:20, 7:21, 9:10, 9:13, 10:10, 10:15, 10:20, 15:16, 22:3, 24:3, 24:13, 24:18, 24:21, 24:22, 24:23, 25:19, 25:21, 25:24, 31:13, 31:17, 33:8, 33:12, 33:21, 33:24, 34:2, 34:5, 36:20, 36:22, 38:18, 38:19, 39:1, 39:2, 39:9, 39:11, 39:12, 39:13, 39:17, 39:18, 39:21, 39:24, 40:1, 40:2, 40:15, 40:18, 41:13, 41:25, 42:7, 42:11, 42:15, 43:23, 43:24, 51:3, 52:6, 52:21, 52:22, 53:5, 54:24, 57:5, 57:18, 57:21, 57:24, 58:9, 58:22, 59:2, 59:18, 60:7, 60:8, 60:11, 60:18, 60:23, 61:23, 61:24, 62:1, 64:5, 64:8, 64:9, 66:12, 76:2, 76:3, 76:7, 76:8, 76:11, 79:10, 79:18, 81:4, 81:6, 81:7, 81:10, 86:10, 91:23, 91:25, 92:18, 93:16, 96:21, 96:23, 97:1, 98:17, 99:1, 99:18, 104:9, 106:21, 106:22, 109:17, 109:18, 111:14, 111:18, 111:21, 111:24, 112:10, 112:20, 112:25, 113:25, 114:13, 114:16, 115:2, 117:10, 117:13, 117:15, 117:18, 118:7, 118:18, 118:21, 118:22, 119:1, 119:8, 120:10, 122:20, 123:10, 123:18, 123:21, 123:22, 123:24, 124:1, 124:5, 124:9, 124:10, 124:13, 124:17, 124:21,
---	---	--	---

170:19, 170:21, 171:2, 171:7, 171:16, 175:2, 175:10, 175:19, 175:23, 176:14, 179:2, 179:4, 179:22, 180:2, 180:4, 180:10, 180:24, 181:1, 181:2, 182:20, 185:8, 189:23, 190:3, 190:9, 190:14, 191:4, 191:9, 191:13, 191:16, 194:12, 194:25, 195:8, 195:18, 196:1, 197:4, 197:16, 197:25, 198:4, 198:10, 198:20, 199:4, 199:6, 199:21, 199:25, 200:15, 201:10, 201:17, 202:6, 202:7, 203:4, 203:5, 210:2, 211:13, 212:3, 212:18, 213:11, 214:22, 216:3, 217:4, 217:6, 218:9, 219:7, 219:9, 219:15, 219:16, 220:15, 220:22, 220:24, 221:1, 221:8, 221:13, 221:15, 221:24, 222:8, 224:9, 224:25, 225:1, 225:15, 225:19, 225:23, 226:15, 228:1, 228:12, 229:2, 230:12, 230:20, 230:23, 231:4, 231:5, 231:11, 231:15, 231:19, 232:9, 232:18, 232:20, 233:6, 233:24, 234:8, 235:2, 235:21, 236:5, 236:15, 236:19, 237:2, 237:5, 237:11 DEA's [7] - 38:24, 46:15, 107:25, 200:3, 229:9, 234:3, 234:6 DEA/ARCOS [1] - 103:8 deal [1] - 177:14 dealing [1] - 147:6 dealt [3] - 43:11,	43:12, 147:8 Death [1] - 174:2 death [1] - 174:9 decades [2] - 22:5, 170:16 decide [3] - 85:12, 87:4, 88:2 decided [5] - 83:21, 85:25, 88:9, 147:12, 180:24 decides [1] - 44:20 deciding [1] - 216:24 decision [9] - 83:3, 86:19, 86:24, 87:2, 87:5, 101:19, 113:23, 114:1, 201:4 decisions [8] - 82:8, 88:15, 88:25, 89:10, 89:13, 94:9, 97:11, 124:19 deck [2] - 202:4, 202:23 declarations [1] - 157:9 declared [1] - 217:15 decrease [2] - 29:12, 32:8 decreased [2] - 30:5, 30:11 deem [2] - 93:2, 163:17 deeper [1] - 115:6 Defendant [4] - 4:10, 5:2, 5:7, 6:2 defendant [7] - 24:21, 27:14, 42:12, 61:8, 68:18, 76:11, 124:5 defendant's [2] - 79:3, 121:18 Defendants [3] - 1:8, 1:14, 238:7 defendants [28] - 39:13, 44:3, 59:17, 59:21, 60:23, 63:17, 66:14, 67:7, 67:24, 68:4, 69:7, 69:11, 69:24, 71:22, 73:2, 77:24, 78:25, 79:19, 79:22, 82:3, 82:25, 86:12, 86:20, 90:13, 92:1, 103:21, 109:18, 123:11 Defendants' [2] - 8:7, 11:2 defendants' [5] - 39:18, 60:11, 67:17, 122:14, 124:10 defenses [1] - 205:10 defer [1] - 88:1 defined [2] - 98:17,	154:25 definition [13] - 17:4, 103:5, 103:6, 103:8, 103:24, 104:11, 104:21, 105:11, 105:16, 106:3, 189:1 definitions [2] - 105:19, 105:21 delay [1] - 126:14 deliver [1] - 216:25 delivered [1] - 162:3 delivers [1] - 201:23 Demetra [1] - 171:17 Demo [2] - 132:6, 132:23 demographics [2] - 204:6, 204:12 demonstrate [3] - 77:8, 80:7, 86:8 demonstrated [1] - 117:5 demonstrates [2] - 202:25, 203:14 demonstrative [9] - 19:22, 46:14, 49:8, 84:5, 94:25, 95:2, 95:5, 95:8, 132:4 demonstratives [2] - 72:2, 90:10 demoted [1] - 145:13 denying [1] - 101:3 Department [4] - 139:4, 147:24, 148:15, 148:20 department [17] - 130:18, 132:21, 135:15, 137:24, 138:1, 138:2, 138:3, 138:10, 138:13, 143:6, 143:13, 143:14, 144:16, 148:14, 151:14, 167:14, 213:22 dependence [1] - 156:5 dependent [1] - 198:12 depicted [1] - 55:23 depiction [4] - 129:10, 132:24, 133:18, 134:22 depo [1] - 234:6 deponent [1] - 164:2 deposed [3] - 168:17, 170:19, 171:7 deposition [13] - 100:11, 100:16, 163:22, 164:5, 165:3, 166:17, 168:6, 168:15,	171:1, 171:10, 171:15, 196:4, 212:16 depositions [1] - 171:6 depth [1] - 233:2 DEPUTY [1] - 127:19 describe [3] - 24:1, 59:19, 224:16 described [3] - 40:10, 59:1, 224:17 description [1] - 40:1 deserves [1] - 88:17 design [2] - 163:11, 186:10 designate [1] - 197:7 designed [8] - 82:20, 83:5, 152:16, 163:4, 215:23, 215:25, 228:3, 233:9 designing [2] - 191:22, 235:7 despite [1] - 121:15 destroyed [1] - 107:17 destruction [5] - 107:14, 107:25, 108:6, 108:13, 153:2 detail [4] - 15:25, 29:1, 45:8, 46:2 detailed [3] - 30:24, 78:19, 80:5 details [4] - 29:4, 30:22, 35:3, 46:5 detect [1] - 228:3 determination [3] - 94:16, 107:2, 109:11 determinations [1] - 93:21 determine [8] - 28:11, 109:10, 126:11, 130:11, 161:9, 167:11, 206:23, 232:11 determined [3] - 39:7, 40:14, 41:18 determining [6] - 191:24, 203:22, 204:2, 204:6, 204:12, 206:14 detrimental [2] - 158:1, 217:16 devastating [1] - 173:20 developing [1] - 99:2 development [1] - 100:3 devise [1] - 219:9 diagram [2] - 133:8, 133:19 Dictionary [2] - 104:3,	104:5 differ [1] - 217:3 difference [7] - 18:1, 76:5, 119:14, 125:19, 148:8, 148:10, 206:1 differences [1] - 37:18 different [44] - 13:16, 18:24, 27:8, 29:14, 29:19, 39:6, 44:15, 61:2, 68:24, 78:4, 82:2, 86:20, 97:2, 97:4, 99:21, 104:2, 106:22, 111:15, 112:15, 121:13, 122:5, 122:9, 122:17, 123:2, 134:12, 141:18, 144:21, 147:16, 153:25, 169:4, 177:4, 181:13, 186:19, 186:25, 189:20, 207:9, 207:10, 219:11, 220:21, 224:5, 236:19 differentiation [1] - 105:17 differently [1] - 111:8 dig [2] - 14:18, 115:6 digit [3] - 48:14, 48:19, 50:2 Diligence [1] - 145:24 diligence [26] - 57:25, 58:9, 58:22, 59:1, 59:4, 59:8, 59:14, 59:15, 59:18, 59:20, 59:25, 60:3, 60:18, 60:24, 66:13, 66:16, 66:18, 67:15, 67:16, 137:10, 187:6, 191:22, 204:16, 218:21, 218:23, 233:7 diligent [1] - 232:17 diminimous [1] - 119:8 DIRECT [1] - 127:25 Direct [2] - 198:17, 198:21 direct [10] - 28:7, 81:6, 81:15, 138:17, 145:3, 151:14, 151:16, 180:19, 231:11, 231:18 direction [1] - 234:25 directions [1] - 121:10 directly [5] - 62:20, 65:2, 65:6, 134:1, 185:1
--	---	---	---	---

Director [11] - 135:24, 136:6, 136:9, 136:25, 138:22, 140:7, 140:10, 140:24, 143:3, 144:4, 145:21	distributed [11] - 24:25, 36:16, 52:4, 57:9, 57:17, 77:23, 151:10, 202:24, 203:7, 213:13, 218:12	31:16, 31:23, 32:7, 33:16, 34:9, 34:13, 34:16, 35:9, 36:7, 36:11, 36:24, 37:23, 39:3, 42:1, 42:8, 47:6, 49:3, 50:1, 51:11, 52:24, 53:5, 62:4, 62:19	152:20, 158:18, 158:21, 158:25, 159:13, 169:23, 197:22, 214:25, 216:23	diverting [5] - 202:25, 203:11, 203:13, 203:16, 225:16	
director [1] - 147:7	distributing [6] - 34:24, 35:5, 37:21, 114:21, 218:13	Distributor [2] - 194:11, 209:16	District [5] - 7:2, 7:3, 101:15, 101:17, 102:5	dividing [1] - 52:3	
disa [1] - 237:6	distribution [100] - 9:24, 10:15, 33:8, 37:15, 41:23, 41:25, 42:5, 42:7, 42:25, 43:3, 43:16, 43:24, 56:11, 57:5, 57:19, 60:8, 61:9, 61:15, 61:18, 61:23, 62:10, 62:13, 62:16, 62:20, 62:24, 63:2, 63:7, 63:23, 63:25, 64:12, 64:23, 73:18, 73:24, 76:19, 79:6, 93:10, 93:23, 122:8, 136:1, 138:24, 140:9, 140:11, 140:15, 140:17, 140:18, 140:19, 140:21, 141:2, 141:15, 141:17, 141:23, 141:25, 142:4, 142:12, 145:22, 147:15, 147:19, 148:3, 148:5, 148:7, 148:22, 149:7, 149:11, 149:23, 150:11, 151:6, 153:19, 157:20, 157:25, 158:11, 158:13, 162:24, 169:18, 172:19, 172:21, 176:17, 176:25, 186:1, 186:4, 186:14, 187:3, 187:4, 189:8, 202:8, 212:12, 213:13, 213:19, 216:1, 216:18, 216:20, 217:15, 217:20, 222:9, 222:13, 227:11, 227:16, 227:17, 227:20, 232:10, 233:1	distributor [60] - 22:8, 25:20, 26:20, 27:8, 28:22, 29:8, 29:13, 29:14, 29:19, 31:3, 34:5, 34:10, 38:16, 64:11, 65:15, 65:19, 72:14, 72:18, 78:21, 79:6, 94:13, 107:20, 107:21, 107:22, 107:24, 108:2, 108:5, 108:10, 108:12, 108:14, 108:15, 108:18, 109:6, 111:1, 114:23, 115:7, 115:11, 115:12, 115:15, 120:5, 120:7, 120:13, 120:17, 120:13, 120:20, 120:13, 120:21, 120:13, 120:22	DISTRICT [3] - 1:1, 1:1, 1:17	division [1] - 137:24	
disagree [6] - 191:14, 202:10, 236:4, 237:1, 237:4, 237:11	disagreed [1] - 189:23	diverge [1] - 153:12	district [1] - 142:6	diversions [71] - 59:22, 136:13, 137:8, 137:9, 142:19, 144:22, 146:5, 147:1, 147:23, 147:24, 148:1, 151:25, 152:10, 152:17, 153:9, 158:14, 160:23, 161:2, 161:6, 161:10, 161:14, 161:20, 161:21, 162:7, 162:19, 162:20, 164:18, 169:17, 175:20, 177:19, 177:23, 180:13, 181:24, 182:12, 182:14, 183:15, 183:19, 183:21, 184:2, 184:4, 184:5, 184:11, 184:15, 185:3, 186:1, 186:23, 188:24, 189:1, 191:9, 195:19, 198:7, 198:13, 201:20, 201:21, 202:12, 202:17, 202:21, 203:1, 213:7, 215:25, 216:6, 218:10, 219:15, 219:19, 220:10, 220:13, 221:25, 222:1, 222:4, 228:3, 236:8	districts [18] - 7:23, 11:6, 57:25, 58:9, 58:22, 59:2, 59:17, 60:14, 60:15, 60:18, 60:24, 66:16, 71:9, 127:21, 135:1, 176:10, 176:11, 194:20
disagreement [2] - 231:20, 231:22	disagrees [1] - 190:3	Diversion [12] - 137:1, 137:7, 144:5	DOJ [1] - 230:23		
discover [2] - 102:14, 200:3	disclosed [1] - 188:3	Distributions [1] - 216:17	Don [1] - 171:19		
Discovered [1] - 199:21	discovery [3] - 123:22, 124:10, 168:11	distributors [55] - 23:24, 24:3, 24:15, 25:22, 25:24, 28:2, 29:5, 29:25, 32:21, 33:1, 33:9, 33:12, 35:7, 39:8, 43:20, 45:15, 45:19, 47:7, 56:3, 56:12, 56:18, 57:4, 58:13, 71:13, 73:1, 81:7, 81:8, 81:18, 98:19, 98:20, 107:12, 107:13,	done [12] - 20:23, 24:24, 81:14, 91:22, 91:24, 94:7, 99:23, 100:1, 100:4, 100:14, 132:1, 168:20		
discovered [3] - 200:1, 200:16, 200:22	discussion [4] - 7:19, 111:12, 165:24, 165:25	107:15, 107:18, 108:23, 109:1, 112:4, 112:7, 113:12, 113:13, 113:19, 113:21, 114:14, 115:9, 115:22, 116:8,	door [5] - 104:3, 104:6, 104:16, 104:19, 105:5		
discussions [4] - 59:25, 72:6, 82:11, 229:22	display [2] - 182:2, 208:21	Diversion [12] - 137:1, 137:7, 144:5	dosage [16] - 24:14, 26:10, 29:24, 69:10, 73:6, 73:12, 103:1, 104:12, 104:18, 104:23, 105:23, 106:5, 113:10, 223:24, 224:6		
diskettes [1] - 169:22	displayed [1] - 95:7	145:20, 145:23, 146:6, 147:3, 147:10, 147:13, 147:17, 147:24, 230:19			
dispensers [10] - 24:15, 39:8, 47:7, 98:21, 112:11, 113:12, 113:19, 113:21, 114:15, 122:21	displaying [1] - 91:4	diverted [2] - 180:20, 218:22			
disposal [2] - 180:12, 181:5	distance [1] - 20:20				
distances [1] - 68:1	distill [1] - 153:11				
distinct [1] - 126:22	distinction [1] - 113:1				
distribute [1] - 214:21					

224:15 double [3] - 110:1, 112:13, 113:14 doubt [1] - 52:12 Douglas [1] - 4:17 down [37] - 31:3, 38:5, 40:7, 50:19, 60:2, 67:3, 71:22, 72:4, 79:2, 81:16, 82:4, 101:13, 112:1, 113:18, 119:12, 121:8, 122:20, 126:24, 129:9, 131:13, 132:8, 139:2, 140:13, 146:9, 146:21, 149:5, 153:11, 157:22, 169:21, 185:16, 194:18, 203:9, 203:10, 214:2, 225:16, 225:20, 228:1 Dr [99] - 7:5, 7:10, 7:16, 8:6, 14:19, 21:3, 23:7, 23:16, 23:22, 26:2, 28:17, 29:23, 36:4, 38:17, 41:22, 42:4, 42:21, 44:15, 52:23, 61:2, 61:5, 63:15, 64:20, 65:14, 66:5, 66:10, 66:12, 66:21, 67:1, 67:6, 67:12, 67:23, 68:3, 68:16, 69:25, 70:11, 70:15, 71:18, 72:9, 73:5, 73:15, 74:18, 74:23, 75:13, 75:24, 76:13, 76:14, 77:16, 78:23, 79:11, 79:25, 81:1, 81:7, 81:10, 85:24, 86:6, 89:17, 92:12, 92:23, 94:5, 98:2, 98:9, 99:19, 100:24, 101:4, 101:10, 101:25, 102:7, 102:8, 102:11, 102:13, 102:16, 102:21, 103:5, 103:20, 103:24, 104:10, 104:17, 105:6, 105:22, 106:11, 106:15, 106:18, 106:20, 110:21, 112:25, 113:4, 117:15, 118:5, 119:7, 120:25, 121:21, 122:12, 122:16, 122:25, 124:10,	125:21, 125:25 draw [4] - 30:2, 32:20, 118:21, 158:17 drawing [1] - 139:8 drawn [1] - 88:3 Dreamland [1] - 208:12 drill [1] - 119:11 drive [1] - 54:16 Drive [1] - 6:15 driven [1] - 30:22 driving [1] - 111:18 drop [4] - 140:13, 160:19, 160:23, 162:17 Drug [17] - 6:2, 47:12, 47:23, 48:13, 49:21, 50:1, 50:5, 51:3, 122:22, 124:2, 128:6, 135:24, 177:12, 182:23, 212:7, 214:20, 238:7 DRUG [2] - 1:7, 1:13 drug [19] - 37:11, 37:12, 62:8, 62:9, 62:15, 64:10, 107:20, 111:1, 136:1, 140:9, 155:15, 155:16, 155:19, 156:4, 169:12, 214:25, 216:1, 218:6 drugs [26] - 34:21, 43:8, 43:13, 45:23, 56:11, 62:13, 120:6, 153:10, 155:6, 156:17, 157:14, 159:17, 159:19, 161:12, 162:6, 201:1, 201:2, 202:24, 203:6, 203:12, 203:16, 215:7, 215:11, 217:5, 220:24, 236:10 dual [1] - 145:8 due [18] - 59:1, 59:4, 59:8, 59:14, 59:20, 60:3, 66:13, 66:16, 66:18, 67:15, 67:16, 137:10, 187:6, 191:22, 204:16, 218:20, 218:23, 233:7 Due [1] - 145:24 duly [1] - 221:10 duplicate [1] - 40:14 During [1] - 188:3 during [17] - 25:9, 25:15, 25:24, 26:21,	28:14, 30:7, 31:20, 34:9, 62:6, 100:4, 100:17, 123:21, 123:23, 148:15, 198:21, 224:17, 231:18 duties [6] - 142:19, 160:17, 168:21, 189:22, 191:17, 212:8 duty [27] - 130:20, 161:25, 162:16, 162:19, 162:22, 162:23, 163:1, 163:9, 163:11, 163:12, 163:15, 164:18, 164:25, 165:7, 165:8, 165:10, 165:21, 165:24, 166:2, 166:3, 166:12, 166:20, 190:7, 190:10, 199:25, 233:13, 233:25 dying [1] - 114:8	ended [1] - 183:11 ends [1] - 162:17 Enforcement [4] - 177:12, 182:23, 212:7, 214:20 enforcement [3] - 50:11, 181:7, 201:18 enforcing [1] - 101:23 enjoy [2] - 156:11, 156:12 enormous [1] - 218:10 ensure [3] - 162:3, 162:7, 216:4 ensuring [1] - 203:5 enter [3] - 11:11, 101:23, 132:13 entered [6] - 62:14, 96:18, 175:22, 177:13, 226:5, 226:15 entire [12] - 47:13, 47:18, 47:24, 48:4, 79:10, 101:9, 111:25, 113:18, 142:8, 162:24, 210:10, 217:25 entirely [1] - 70:17 entity [1] - 214:19 ENU [1] - 4:12 envisioned [1] - 216:23 epidemic [15] - 171:3, 172:23, 172:25, 173:3, 173:6, 173:10, 173:11, 173:16, 173:19, 173:22, 173:25, 174:13, 174:18, 174:22, 174:24 equally [1] - 186:14 Eric [6] - 140:1, 140:5, 141:7, 141:9 erred [1] - 102:5 erroneous [2] - 107:2, 107:3 error [7] - 38:24, 101:22, 102:14, 108:24, 109:10, 115:9, 116:8 errors [1] - 109:10 especially [1] - 79:7 essentially [2] - 80:15, 119:9 established [2] - 80:16, 155:12 estimate [5] - 14:4, 23:2, 130:25, 131:1, 149:10 estimated [1] - 10:3 et [4] - 1:7, 1:13,
--	---	---	---

<p>238:6, 238:7 event [1] - 92:4 eventually [1] - 218:1 evidence [32] - 11:2, 11:11, 11:13, 80:9, 80:13, 80:16, 81:12, 82:5, 82:9, 82:16, 83:22, 84:4, 85:16, 86:18, 86:23, 87:1, 87:9, 87:17, 87:24, 88:16, 89:6, 92:25, 93:3, 94:22, 95:1, 95:4, 95:7, 102:3, 102:10, 102:12, 124:11, 125:5 evidenced [1] - 103:13 evolution [5] - 145:25, 146:3, 146:13, 146:14, 192:16 evolutions [2] - 192:4, 192:6 evolved [3] - 192:2, 192:7, 192:17 exact [7] - 130:7, 130:24, 131:5, 131:11, 131:21, 185:20, 205:2 exactly [18] - 77:15, 77:22, 78:23, 79:16, 82:19, 83:5, 83:24, 85:13, 88:5, 88:17, 88:19, 91:5, 100:21, 128:23, 136:8, 153:11, 156:1, 172:10 exaggeration [1] - 109:4 examination [9] - 67:19, 68:25, 80:24, 81:6, 81:13, 81:15, 83:23, 114:9, 196:22 EXAMINATION [7] - 23:14, 66:8, 116:20, 118:2, 119:5, 120:22, 127:25 example [19] - 19:12, 28:25, 59:21, 60:8, 62:15, 62:24, 63:18, 71:20, 72:20, 92:3, 94:8, 109:22, 114:8, 114:20, 119:13, 123:18, 183:24, 207:14 examples [7] - 31:6, 53:10, 56:2, 77:8, 85:6, 99:15, 115:4 exceeded [1] - 101:21 exceedence [1] - 60:10 exceeds [1] - 99:16</p>	<p>Excel [1] - 92:21 except [1] - 111:7 excerpted [1] - 71:1 excessive [2] - 206:14, 225:7 exchange [2] - 231:14 exclude [3] - 41:18, 105:2, 105:4 excluded [5] - 15:3, 104:25, 106:24, 107:9, 107:11 excludes [2] - 104:18, 104:19 excluding [2] - 40:13, 112:6 exclusion [1] - 119:7 exclusions [2] - 41:12, 113:4 exclusively [1] - 27:7 excuse [8] - 24:12, 25:12, 25:19, 26:3, 37:19, 38:4, 54:3, 63:15 Excuse [2] - 203:8, 220:5 excused [1] - 125:21 execute [1] - 142:19 Executive [1] - 99:22 exempt [1] - 110:20 exercise [2] - 218:20, 218:23 Exhibit [10] - 8:8, 47:21, 61:3, 68:11, 68:16, 70:16, 70:18, 76:14, 102:17, 103:15 exhibit [15] - 9:6, 20:24, 20:25, 56:14, 72:1, 74:9, 76:15, 91:20, 103:20, 104:8, 105:6, 191:19, 196:4, 196:19, 211:7 exhibits [5] - 43:7, 43:8, 43:10, 76:9, 106:23 existence [1] - 192:10 exists [3] - 172:25, 173:2, 173:5 expansion [1] - 134:21 expect [1] - 208:7 expenses [1] - 101:18 experience [4] - 144:15, 144:18, 145:2 expert [12] - 11:6, 23:22, 26:25, 27:1, 43:7, 89:1, 90:10, 91:10, 97:5, 100:10,</p>	<p>100:16, 121:20 expert's [2] - 46:3, 80:15 experts [1] - 121:12 explain [12] - 39:24, 70:18, 77:3, 96:7, 98:14, 99:21, 114:3, 114:12, 121:3, 121:21, 179:17, 181:20 explained [6] - 39:16, 61:8, 111:23, 117:8, 120:8, 145:22 explaining [1] - 78:12 explanation [1] - 211:6 express [1] - 81:17 expressed [1] - 111:11 expressly [2] - 102:6, 217:15 extended [3] - 104:15, 105:2, 105:4 extensive [5] - 57:24, 58:21, 70:8, 70:12, 78:2 extensively [1] - 69:25 extent [8] - 86:4, 87:13, 89:20, 117:17, 123:5, 187:18, 189:4, 218:6 extraordinary [1] - 66:18 eye [2] - 220:16, 220:24 eyeball [1] - 232:21</p>	<p>205:16, 207:1, 209:2, 220:14, 220:23, 227:19, 229:5 factor [11] - 17:13, 17:17, 17:20, 18:1, 49:13, 49:14, 95:6, 108:21, 177:25, 206:13, 208:2 factors [1] - 16:22 facts [1] - 129:17 fail [2] - 182:15, 184:5 failing [2] - 175:19, 222:9 failure [2] - 92:19, 184:7 Failure [1] - 218:23 fair [12] - 30:13, 36:19, 129:10, 133:18, 134:22, 141:3, 175:18, 176:9, 185:14, 192:5, 201:14, 233:18 fairly [2] - 99:2, 108:24 faith [2] - 132:14, 153:5 fall [2] - 29:7, 100:22 falls [1] - 83:4 Falls [1] - 62:25 familiar [15] - 8:15, 30:17, 37:7, 46:10, 53:14, 120:25, 149:14, 154:7, 155:23, 170:15, 172:7, 188:5, 194:11, 199:10, 203:24 family [1] - 30:20 Family [3] - 17:25, 93:7, 116:22 family-owned [1] - 30:20 far [17] - 19:19, 20:5, 20:13, 21:3, 25:12, 25:18, 51:10, 51:16, 62:3, 68:7, 69:6, 88:12, 90:16, 94:5, 124:20, 149:12, 205:3 FARRELL [109] - 2:3, 91:13, 91:22, 96:2, 96:16, 127:6, 128:1, 130:2, 130:10, 131:23, 132:3, 132:10, 133:13, 134:9, 134:10, 137:23, 146:24, 153:17, 153:18, 156:11, 156:14,</p>	<p>156:15, 157:2, 157:4, 158:4, 160:3, 160:13, 164:23, 165:6, 165:14, 165:19, 166:10, 166:16, 166:19, 166:23, 167:1, 167:9, 171:14, 171:17, 172:5, 174:6, 175:7, 182:8, 182:18, 185:9, 190:12, 205:23, 208:19, 208:25, 209:24, 210:13, 221:5, 234:16, 237:14 fashion [2] - 83:1, 232:11 fast [1] - 99:7 fault [1] - 227:5 Fayette [1] - 208:13</p>
--	---	--	--	--

FCRR [1] - 6:18	findings [1] - 157:9	follow-up [4] - 52:25, 116:18, 120:21, 151:22	30:5, 30:7, 31:21, 34:12, 36:21, 38:10, 62:6, 129:11, 133:10, 134:7, 146:3, 187:25, 188:3, 192:1, 193:12, 193:14, 200:11, 202:5, 204:8	46:11, 51:23, 55:25, 56:12, 60:3, 60:5, 60:8, 60:13, 99:25, 132:14, 132:17, 134:12, 152:8, 157:16, 158:2, 172:22, 176:12, 186:7, 217:17
FDA [2] - 193:4, 236:10	firm [1] - 231:9	followed [2] - 105:20, 148:6	framed [1] - 84:2	generally [14] - 30:17, 32:7, 35:4, 37:7, 37:13, 37:14, 44:23, 45:7, 45:9, 52:10, 58:24, 59:3, 99:24, 112:11
featured [2] - 22:16, 22:20	firm's [1] - 76:1	following [15] - 35:16, 103:21, 142:21, 143:10, 177:12, 194:7, 205:3, 223:8, 224:21, 224:22, 225:1, 226:6, 226:16, 228:10	free [1] - 126:1	generate [1] - 70:20
federal [17] - 67:4, 89:13, 89:15, 100:25, 165:1, 168:21, 181:24, 182:11, 182:15, 183:6, 183:7, 184:1, 184:5, 188:22, 189:24, 191:17, 221:11	first [31] - 9:5, 17:25, 58:16, 58:18, 59:12, 69:3, 77:19, 83:15, 89:13, 90:21, 91:13, 95:13, 99:24, 104:25, 105:6, 105:7, 105:18, 112:3, 120:5, 127:15, 148:15, 169:4, 191:19, 211:21, 214:18, 215:2, 215:5, 222:18, 229:20	Footnote [1] - 102:9	Frequency [1] - 197:12	geographic [7] - 19:2, 19:7, 21:20, 21:21, 112:1, 112:9, 126:20
Federal [13] - 142:23, 144:5, 146:4, 146:17, 147:2, 155:12, 158:9, 162:6, 178:11, 180:9, 233:15, 236:15, 237:9	fit [3] - 93:2, 144:16, 144:19	footnote [3] - 215:14, 215:17, 215:19	frequency [3] - 67:15, 178:12, 197:18	geographical [1] - 110:12
fees [1] - 101:18	five [12] - 69:13, 75:19, 93:17, 112:18, 138:17, 140:21, 141:2, 181:14, 181:18, 182:20, 223:4, 225:21	foregoing [1] - 238:4	frequent [2] - 231:11, 231:18	geographically [1] - 21:23
felt [1] - 219:22	fit [12] - 69:13, 75:19, 93:17, 112:18, 138:17, 140:21, 141:2, 181:14, 181:18, 182:20, 223:4, 225:21	foreseeable [6] - 182:15, 183:14, 183:19, 183:21, 184:2, 184:14	Friday [1] - 84:22	geography [1] - 151:9
Fentanyl [1] - 109:7	FL [1] - 2:14	forget [1] - 185:20	front [16] - 8:7, 8:8, 12:13, 14:21, 19:22, 70:15, 72:13, 77:19, 84:11, 116:15, 129:17, 131:24, 132:2, 196:6, 209:19, 223:21	given [12] - 8:12, 9:20, 10:11, 29:17, 56:1, 59:11, 68:24, 71:16, 97:9, 123:1, 170:6, 218:6
few [19] - 13:6, 16:1, 22:5, 23:18, 23:20, 43:12, 52:25, 53:1, 53:10, 70:25, 82:23, 99:6, 116:14, 116:17, 123:17, 124:4, 127:8, 139:24, 148:16	flag [3] - 126:19, 194:18, 232:20	forgotten [1] - 129:5	front-end [1] - 129:17	Given [2] - 220:8, 220:12
fide [1] - 235:1	flagged [4] - 232:13, 232:16, 232:22, 234:24	form [7] - 94:25, 95:5, 113:25, 162:11, 176:1, 187:22, 234:2	Frost [1] - 139:22	glasses [1] - 227:9
fields [2] - 107:5, 107:8	FLAHIVE [1] - 5:10	format [3] - 182:2, 184:20, 185:12	fruitful [1] - 171:8	global [1] - 81:2
fifteen [1] - 23:4	fleeting [1] - 22:9	formed [1] - 194:5	frustrating [1] - 170:3	government [1] - 109:17
Fifth [2] - 101:9, 102:1	flexibility [1] - 82:10	former [1] - 144:20	Fruth [11] - 29:1, 29:2, 29:5, 30:17, 30:18, 30:25, 31:9, 32:3, 32:4, 32:11, 114:23	grab [1] - 127:23
fifths [2] - 16:7, 16:11	flip [2] - 70:17, 211:17	forms [1] - 162:10	Frye [1] - 100:17	grams [5] - 40:18, 40:23, 41:5, 118:9, 118:13
fighting [1] - 89:3	Flood [2] - 136:18, 136:20	formulate [1] - 95:22	full [4] - 41:7, 102:16, 115:20, 218:3	granted [1] - 101:17
figure [2] - 84:10, 186:21	Floaherty [1] - 5:14	forth [3] - 88:7, 235:7, 235:21	Fuller [2] - 2:4, 2:15	graph [10] - 36:17, 37:21, 38:5, 46:4, 46:14, 46:20, 51:9, 51:13, 72:25, 116:3
figured [1] - 144:16	FLAHIVE [1] - 5:10	forums [1] - 225:13	FULLER [1] - 2:15	graphs [12] - 32:2, 46:10, 46:13, 49:15, 49:16, 50:20, 70:21, 71:13, 76:18, 98:11, 98:15, 114:19
figures [1] - 99:3	fleeting [1] - 22:9	forward [8] - 7:6, 77:15, 78:3, 80:19, 82:9, 126:15, 147:4, 213:21	functions [2] - 145:25, 148:21	gray [2] - 32:20, 32:22
filed [4] - 100:10, 100:16, 167:24, 171:21	focus [7] - 21:8, 26:9, 39:23, 46:19, 61:3, 103:17, 113:11	forwarded [1] - 213:23	furnished [1] - 63:16	great [2] - 96:2, 169:3
files [12] - 59:1, 59:4, 59:6, 59:8, 59:14, 59:15, 59:20, 59:24, 60:3, 60:4, 67:17, 214:9	focused [3] - 43:3, 103:14, 142:1	foundation [11] - 11:4, 92:24, 93:1, 129:24, 133:2, 175:5, 189:11, 191:1, 193:7, 200:9, 208:22	G	greater [2] - 46:7, 47:3
fill [8] - 68:1, 68:7, 68:19, 69:8, 69:12, 161:14, 179:21, 201:6	focusing [1] - 15:5	Four [1] - 21:1	gained [2] - 32:14, 38:10	Greenup [1] - 208:10
filled [3] - 52:20, 107:5, 107:8	Focusing [1] - 33:16	four [15] - 12:21, 12:22, 13:12, 16:7, 16:11, 36:11, 69:13, 71:16, 91:16, 140:21, 141:2, 167:18, 183:20, 205:15, 225:9	Gallia [1] - 208:11	Greg [4] - 142:25, 143:2
filling [1] - 218:21	fold [5] - 47:19, 48:5, 48:20, 49:5, 49:17	four-fifths [2] - 16:7, 16:11	Garrett [1] - 102:15	Greg's [1] - 143:3
final [3] - 7:17, 10:19, 111:18	folks [1] - 8:17	Fourth [1] - 89:23	gatekeeper [1] - 88:13	GRETCHEN [1] - 6:7
	follow [8] - 52:25, 107:24, 116:18, 120:21, 151:22, 184:13, 189:5, 220:1	fraction [1] - 37:3	General [2] - 100:18, 170:4	gross [1] - 114:11
	follow-on [1] - 107:24	frame [23] - 25:9, 25:15, 25:25, 30:3,	general [20] - 38:4,	grounds [1] - 102:6
				Group [2] - 146:16, 147:10

group [8] - 13:14, 139:5, 148:17, 213:8, 213:16, 213:20, 213:21, 233:3	hate [1] - 184:17	height [1] - 122:8	82:13, 82:15, 82:21, 83:1, 83:5, 83:8, 83:16, 83:17, 83:24, 84:2, 84:10, 84:11, 84:14, 85:4, 85:8, 85:10, 85:19, 85:20, 86:8, 86:11, 86:13, 86:18, 86:22, 87:2, 87:6, 87:9, 87:10, 88:1, 88:5, 88:10, 88:21, 89:10, 90:1, 90:4, 90:5, 90:9, 90:12, 90:18, 91:8, 93:5, 93:25, 94:4, 94:12, 94:19, 97:20, 97:24, 97:25, 98:7, 101:6, 102:19, 105:13, 106:8, 106:10, 106:14, 110:22, 112:23, 114:7, 116:17, 117:21, 120:17, 120:24, 123:8, 124:13, 125:1, 125:3, 125:14, 125:18, 125:20, 125:23, 126:2, 126:25, 127:2, 127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185:4, 193:8, 205:20, 209:21, 210:8, 210:22, 211:3, 216:8, 223:15, 223:18, 226:25, 229:17, 234:2	206:15, 207:25
grouped [2] - 43:8, 60:2	heights [3] - 116:5, 122:6, 122:8	held [2] - 91:9, 233:2	84:2, 84:10, 84:11, 84:14, 85:4, 85:8, 85:10, 85:19, 85:20, 86:8, 86:11, 86:13, 86:18, 86:22, 87:2, 87:6, 87:9, 87:10, 88:1, 88:5, 88:10, 88:21, 89:10, 90:1, 90:4, 90:5, 90:9, 90:12, 90:18, 91:8, 93:5, 93:25, 94:4, 94:12, 94:19, 97:20, 97:24, 97:25, 98:7, 101:6, 102:19, 105:13, 106:8, 106:10, 106:14, 110:22, 112:23, 114:7, 116:17, 117:21, 120:17, 120:24, 123:8, 124:13, 125:1, 125:3, 125:14, 125:18, 125:20, 125:23, 126:2, 126:25, 127:2, 127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185:4, 193:8, 205:20, 209:21, 210:8, 210:22, 211:3, 216:8, 223:15, 223:18, 226:25, 229:17, 234:2	human [1] - 174:19
groups [1] - 147:20	help [8] - 16:25, 80:14, 80:19, 84:8, 100:6, 111:2, 169:13, 169:17	Help [1] - 179:8	84:2, 84:10, 84:11, 84:14, 85:4, 85:8, 85:10, 85:19, 85:20, 86:8, 86:11, 86:13, 86:18, 86:22, 87:2, 87:6, 87:9, 87:10, 88:1, 88:5, 88:10, 88:21, 89:10, 90:1, 90:4, 90:5, 90:9, 90:12, 90:18, 91:8, 93:5, 93:25, 94:4, 94:12, 94:19, 97:20, 97:24, 97:25, 98:7, 101:6, 102:19, 105:13, 106:8, 106:10, 106:14, 110:22, 112:23, 114:7, 116:17, 117:21, 120:17, 120:24, 123:8, 124:13, 125:1, 125:3, 125:14, 125:18, 125:20, 125:23, 126:2, 126:25, 127:2, 127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185:4, 193:8, 205:20, 209:21, 210:8, 210:22, 211:3, 216:8, 223:15, 223:18, 226:25, 229:17, 234:2	hundreds [1] - 74:7
growing [2] - 215:8, 215:11	headers [2] - 53:3, 54:8	Helpful [2] - 183:4, 187:24	84:2, 84:10, 84:11, 84:14, 85:4, 85:8, 85:10, 85:19, 85:20, 86:8, 86:11, 86:13, 86:18, 86:22, 87:2, 87:6, 87:9, 87:10, 88:1, 88:5, 88:10, 88:21, 89:10, 90:1, 90:4, 90:5, 90:9, 90:12, 90:18, 91:8, 93:5, 93:25, 94:4, 94:12, 94:19, 97:20, 97:24, 97:25, 98:7, 101:6, 102:19, 105:13, 106:8, 106:10, 106:14, 110:22, 112:23, 114:7, 116:17, 117:21, 120:17, 120:24, 123:8, 124:13, 125:1, 125:3, 125:14, 125:18, 125:20, 125:23, 126:2, 126:25, 127:2, 127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185:4, 193:8, 205:20, 209:21, 210:8, 210:22, 211:3, 216:8, 223:15, 223:18, 226:25, 229:17, 234:2	hundredth [1] - 107:7
guess [14] - 16:25, 17:1, 28:7, 120:10, 131:12, 151:5, 177:24, 180:18, 184:7, 190:22, 205:16, 208:17, 208:21, 230:23	headquarters [1] - 177:2	Helpful [2] - 183:4, 187:24	84:2, 84:10, 84:11, 84:14, 85:4, 85:8, 85:10, 85:19, 85:20, 86:8, 86:11, 86:13, 86:18, 86:22, 87:2, 87:6, 87:9, 87:10, 88:1, 88:5, 88:10, 88:21, 89:10, 90:1, 90:4, 90:5, 90:9, 90:12, 90:18, 91:8, 93:5, 93:25, 94:4, 94:12, 94:19, 97:20, 97:24, 97:25, 98:7, 101:6, 102:19, 105:13, 106:8, 106:10, 106:14, 110:22, 112:23, 114:7, 116:17, 117:21, 120:17, 120:24, 123:8, 124:13, 125:1, 125:3, 125:14, 125:18, 125:20, 125:23, 126:2, 126:25, 127:2, 127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185:4, 193:8, 205:20, 209:21, 210:8, 210:22, 211:3, 216:8, 223:15, 223:18, 226:25, 229:17, 234:2	hundredths [2] - 23:4, 112:18
guidance [2] - 85:21, 212:2	Health [51] - 4:11, 5:2, 23:19, 24:25, 25:3, 25:7, 25:23, 27:12, 29:3, 31:17, 31:25, 32:3, 32:12, 32:14, 32:21, 33:13, 33:17, 33:21, 34:4, 35:1, 37:2, 37:23, 37:25, 38:10, 38:19, 38:23, 41:24, 42:6, 42:10, 42:14, 42:23, 44:1, 55:1, 57:8, 57:17, 57:18, 57:24, 58:21, 60:22, 61:4, 61:14, 62:4, 63:24, 64:24, 114:22, 115:2, 115:5, 123:18, 125:2, 159:3, 207:15	high [7] - 44:9, 44:12, 119:25, 155:1, 155:5, 155:7, 155:16	84:2, 84:10, 84:11, 84:14, 85:4, 85:8, 85:10, 85:19, 85:20, 86:8, 86:11, 86:13, 86:18, 86:22, 87:2, 87:6, 87:9, 87:10, 88:1, 88:5, 88:10, 88:21, 89:10, 90:1, 90:4, 90:5, 90:9, 90:12, 90:18, 91:8, 93:5, 93:25, 94:4, 94:12, 94:19, 97:20, 97:24, 97:25, 98:7, 101:6, 102:19, 105:13, 106:8, 106:10, 106:14, 110:22, 112:23, 114:7, 116:17, 117:21, 120:17, 120:24, 123:8, 124:13, 125:1, 125:3, 125:14, 125:18, 125:20, 125:23, 126:2, 126:25, 127:2, 127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185:4, 193:8, 205:20, 209:21, 210:8, 210:22, 211:3, 216:8, 223:15, 223:18, 226:25, 229:17, 234:2	Huntington [105] - 3:10, 4:1, 12:21, 12:22, 12:23, 13:10, 15:18, 15:22, 16:12, 18:6, 19:19, 20:1, 20:5, 20:10, 23:25, 24:5, 25:1, 25:9, 26:4, 29:25, 30:5, 30:25, 31:10, 32:13, 33:2, 34:25, 36:8, 36:12, 36:15, 37:22, 38:9, 43:25, 44:10, 48:15, 48:20, 48:24, 49:4, 50:10, 52:2, 52:4, 52:5, 52:15, 52:19, 52:25, 53:4, 53:6, 53:8, 54:9, 54:17, 54:20, 54:25, 55:5, 56:4, 56:9, 56:10, 57:3, 57:20, 57:23, 58:10, 58:20, 59:5, 59:24, 60:12, 60:20, 60:25, 61:10, 61:14, 61:20, 61:25, 62:6, 62:9, 62:14, 64:1, 64:16, 65:1, 65:3, 65:7, 100:8, 111:6, 111:23, 112:1, 112:4, 112:12, 115:3, 115:24, 116:11, 126:21, 129:20, 130:12, 130:23, 131:3, 149:15, 149:17, 149:24, 167:13, 168:16, 173:6, 173:15, 174:15, 174:19, 174:24, 204:23, 208:5, 209:3, 238:6
half [7] - 15:12, 15:13, 15:21, 104:10, 111:12, 116:4	health [8] - 50:11, 157:16, 158:2, 173:20, 174:11, 215:8, 215:12, 217:17	highlight [1] - 20:4	127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185:4, 193:8, 205:20, 209:21, 210:8, 210:22, 211:3, 216:8, 223:15, 223:18, 226:25, 229:17, 234:2	HUNTINGTON [1] - 1:4
half's [1] - 99:24	Health's [21] - 25:20, 30:7, 30:12, 32:13, 34:8, 34:16, 36:24, 38:8, 39:3, 55:5, 55:14, 58:10, 61:15, 61:24, 63:23, 64:23, 65:4, 65:8, 65:11, 114:25, 115:17	himself [1] - 11:18	127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185:4, 193:8, 205:20, 209:21, 210:8, 210:22, 211:3, 216:8, 223:15, 223:18, 226:25, 229:17, 234:2	Huntington-Cabell [6]
hand [15] - 25:13, 76:13, 78:24, 79:2, 80:9, 101:14, 127:17, 150:13, 157:8, 197:4, 199:3, 208:19, 214:2, 226:3, 228:20	healthcare [6] - 52:9, 203:22, 205:12, 206:2, 206:15, 208:4	hire [1] - 144:17	127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185:4, 193:8, 205:20, 209:21, 210:8, 210:22, 211:3, 216:8, 223:15, 223:18, 226:25, 229:17, 234:2	- 15:18, 126:21, 149:15, 149:17, 149:24, 167:13, 168:16, 173:6, 173:15, 174:15, 174:19, 174:24, 204:23, 208:5, 209:3, 238:6
hand-picked [1] - 80:9	hear [4] - 70:5, 85:3, 85:11, 196:14	hired [1] - 144:8	127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185:4, 193:8, 205:20, 209:21, 210:8, 210:22, 211:3, 216:8, 223:15, 223:18, 226:25, 229:17, 234:2	- 15:18, 126:21, 149:15, 149:17, 149:24, 167:13, 168:16, 173:6, 173:15, 174:15, 174:19, 174:24, 204:23, 208:5, 209:3, 238:6
Handbook [2] - 107:4, 107:9	heard [11] - 52:16, 58:25, 69:7, 84:18, 84:24, 94:18, 97:12, 159:11, 204:23, 210:21, 212:21	history [1] - 144:24	127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185:4, 193:8, 205:20, 209:21, 210:8, 210:22, 211:3, 216:8, 223:15, 223:18, 226:25, 229:17, 234:2	Huntington/Cabell [6]
handed [1] - 101:9	hearing [3] - 94:17, 100:17, 156:12	hit [1] - 132:6	127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185:4, 193:8, 205:20, 209:21, 210:8, 210:22, 211:3, 216:8, 223:15, 223:18, 226:25, 229:17, 234:2	- 15:18, 126:21, 149:15, 149:17, 149:24, 167:13, 168:16, 173:6, 173:15, 174:15, 174:19, 174:24, 204:23, 208:5, 209:3, 238:6
handful [1] - 82:4	hearings [1] - 193:25	hold [4] - 83:12, 86:19, 143:22, 159:9	127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185:4, 193:8, 205:20, 209:21, 210:8, 210:22, 211:3, 216:8, 223:15, 223:18, 226:25, 229:17, 234:2	Huntington/Ashland [1] - 52:14
handle [2] - 144:25, 154:2	hearingsay [2] - 196:20, 211:2	holding [2] - 199:10, 208:19	127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185:4, 193:8, 205:20, 209:21, 210:8, 210:22, 211:3, 216:8, 223:15, 223:18, 226:25, 229:17, 234:2	Huntington/Cabell [6]
handlers [1] - 216:2		honor [1] - 126:3	127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185:4, 193:8, 205:20, 209:21, 210:8, 210:22, 211:3, 216:8, 223:15, 223:18, 226:25, 229:17, 234:2	
handling [3] - 90:21, 145:1, 154:1		honor's [1] - 85:20	127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185:4, 193:8, 205:20, 209:21, 210:8, 210:22, 211:3, 216:8, 223:15, 223:18, 226:25, 229:17, 234:2	
happy [4] - 35:16, 58:17, 83:20		Honor [148] - 7:8, 7:11, 7:12, 8:1, 11:1, 11:3, 11:14, 12:7, 54:11, 56:17, 63:19, 66:1, 66:4, 66:5, 66:11, 67:1, 67:18, 68:12, 68:22, 69:3, 69:6, 69:9, 69:16, 69:23, 70:5, 70:6, 70:8, 71:9, 71:24, 72:3, 73:1, 73:15, 74:19, 75:1, 75:14, 76:22, 77:5, 77:8, 77:13, 77:14, 77:18, 77:19, 78:7, 78:16, 79:4, 79:8, 79:23, 80:6, 80:8, 81:21, 81:25, 82:6, 82:8, 82:8	127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185:4, 193:8, 205:20, 209:21, 210:8, 210:22, 211:3, 216:8, 223:15, 223:18, 226:25, 229:17, 234:2	
hard [1] - 24:9		Honor [1] - 7:1	127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185:4, 193:8, 205:20, 209:21, 210:8, 210:22, 211:3, 216:8, 223:15, 223:18, 226:25, 229:17, 234:2	
HARDIN [1] - 5:3		horse [1] - 85:6	127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185:4, 193:8, 205:20, 209:21, 210:8, 210:22, 211:3, 216:8, 223:15, 223:18, 226:25, 229:17, 234:2	
harm [1] - 218:10		Hospital [1] - 15:3	127:22, 134:2, 153:14, 156:7, 160:3, 165:2, 165:14, 171:4, 182:1, 184:16, 185	

18:13, 19:8, 20:14, 21:4, 21:18, 21:20, 22:1, 22:2, 22:16, 52:11, 173:10, 207:2, 207:17, 227:22	hydrocodone [74] - 13:7, 13:9, 15:9, 15:21, 24:14, 25:1, 25:8, 25:14, 26:5, 26:11, 26:14, 26:21, 27:7, 28:3, 29:24, 30:4, 31:9, 32:9, 33:1, 34:21, 34:24, 35:2, 35:5, 35:7, 36:11, 36:14, 37:3, 37:7, 37:11, 37:19, 37:20, 38:1, 38:4, 38:9, 38:13, 43:5, 43:12, 43:16, 44:10, 44:21, 47:6, 47:12, 47:17, 47:23, 48:3, 48:12, 48:18, 49:3, 55:1, 55:6, 55:10, 55:14, 61:10, 61:13, 61:19, 61:25, 62:5, 63:25, 65:1, 67:10, 72:18, 72:21, 73:6, 105:24, 106:6, 129:20, 130:21, 154:13, 154:14, 154:16, 154:20, 154:21, 223:24, 224:6	import [1] - 123:23 important [1] - 92:2 importantly [1] - 92:23 importation [2] - 157:20, 157:24 imposed [2] - 160:18, 165:1 imposing [1] - 163:1 impossible [1] - 163:3 impractical [1] - 82:17 improper [1] - 157:25 IN [2] - 1:1, 1:18 in-depth [1] - 233:2 inappropriate [2] - 11:6, 69:21 inartful [1] - 203:25 inches [1] - 122:6 include [25] - 43:7, 63:16, 76:10, 77:16, 77:17, 78:1, 78:2, 79:5, 80:2, 103:22, 104:15, 105:10, 105:25, 106:2, 109:21, 112:8, 113:23, 131:8, 142:14, 154:9, 154:11, 175:25, 202:17 included [20] - 41:25, 42:7, 56:21, 64:5, 70:21, 77:25, 79:3, 81:18, 94:13, 108:22, 109:20, 110:5, 110:7, 120:9, 123:7, 146:4, 157:14, 165:3, 227:17, 227:20 includes [8] - 41:7, 71:2, 74:8, 109:17, 123:4, 154:13, 227:9, 227:17 including [14] - 10:11, 15:6, 24:4, 29:5, 39:17, 89:16, 111:5, 112:14, 117:18, 118:24, 171:16, 208:9, 210:11, 222:5 Including [1] - 210:12 inclusion [1] - 13:18 inconsistent [3] - 107:9, 165:4, 167:6 inconsistently [1] - 166:21 imperceptibly [1] - 111:8 implement [2] - 177:8, 231:13 implementation [3] - 228:13, 229:10, 229:23 implied [1] - 89:7	48:4, 48:20, 51:11 increases [2] - 111:3, 116:9 increasing [1] - 46:4 increment [1] - 131:9 independent [1] - 45:22 indicate [1] - 128:13 indicates [1] - 10:6 indicator [1] - 106:25 individual [4] - 92:10, 140:11, 148:21, 164:1 individually [1] - 43:9 individuals [4] - 50:10, 99:11, 132:22, 178:25 individuals' [2] - 8:19, 174:14 industrial [1] - 218:23 industry [3] - 231:4, 231:7, 235:19 infer [1] - 200:6 inference [1] - 217:3 inferred [1] - 233:24 information [25] - 28:10, 33:5, 41:24, 42:6, 49:21, 50:13, 54:19, 64:15, 71:2, 74:24, 75:4, 78:19, 80:6, 94:24, 95:23, 123:11, 162:13, 169:13, 178:24, 179:1, 180:11, 181:3, 192:8, 201:17, 231:15 inherent [1] - 93:20 initial [1] - 100:4 Initiative [2] - 194:11, 209:17 initiative [1] - 224:22 inquiry [1] - 233:3 inserted [3] - 145:15, 145:18, 145:19 inside [1] - 68:25 inspect [2] - 235:11, 235:25 instance [4] - 109:16, 114:25, 204:20, 207:1 instances [2] - 16:24, 110:3 Instead [1] - 176:24 instead [4] - 93:15, 100:5, 108:20, 183:20 instructions [1] - 101:23 insufficient [1] - 221:10
idea [5] - 34:8, 38:22, 52:18, 93:12, 128:21 identifiable [1] - 63:7 identified [20] - 53:4, 56:8, 61:22, 62:4, 62:24, 63:9, 63:10, 72:21, 80:5, 82:14, 94:11, 104:7, 128:5, 144:4, 151:6, 158:20, 175:23, 219:13, 224:8, 225:11 identifies [4] - 72:14, 73:18, 163:12, 196:19 identify [12] - 11:20, 11:23, 22:1, 66:21, 79:6, 104:3, 128:6, 135:3, 139:24, 143:24, 179:4, 186:10 identifying [4] - 64:11,	idea [5] - 34:8, 38:22, 52:18, 93:12, 128:21 identifiable [1] - 63:7 identified [20] - 53:4, 56:8, 61:22, 62:4, 62:24, 63:9, 63:10, 72:21, 80:5, 82:14, 94:11, 104:7, 128:5, 144:4, 151:6, 158:20, 175:23, 219:13, 224:8, 225:11 identifies [4] - 72:14, 73:18, 163:12, 196:19 identify [12] - 11:20, 11:23, 22:1, 66:21, 79:6, 104:3, 128:6, 135:3, 139:24, 143:24, 179:4, 186:10 identifying [4] - 64:11,	idea [5] - 34:8, 38:22, 52:18, 93:12, 128:21 identifiable [1] - 63:7 identified [20] - 53:4, 56:8, 61:22, 62:4, 62:24, 63:9, 63:10, 72:21, 80:5, 82:14, 94:11, 104:7, 128:5, 144:4, 151:6, 158:20, 175:23, 219:13, 224:8, 225:11 identifies [4] - 72:14, 73:18, 163:12, 196:19 identify [12] - 11:20, 11:23, 22:1, 66:21, 79:6, 104:3, 128:6, 135:3, 139:24, 143:24, 179:4, 186:10 identifying [4] - 64:11,	

investigative [1] - 181:5	January [2] - 224:5	keep [9] - 19:21, 20:16, 20:24, 35:17, 35:21, 162:5, 184:17, 192:8, 202:13	large [5] - 93:9, 98:10, 100:21, 145:1, 207:23	learning [1] - 11:19
Investigator [2] - 136:21, 148:15	JASIEWICZ [1] - 5:4	Keep [2] - 218:16, 235:5	largely [1] - 43:15	least [15] - 10:8, 25:18, 27:25, 29:12, 29:17, 33:10, 34:4, 47:3, 59:7, 62:7, 65:2, 65:6, 69:5, 113:10, 197:16
investigator [1] - 180:24	Jefferson [4] - 21:8, 21:9, 21:12, 53:23	keeping [3] - 152:18, 202:14, 236:8	larger [8] - 16:20, 18:1, 18:7, 51:20, 71:1, 123:1, 178:19, 192:6	leave [5] - 41:17, 95:5, 162:13, 201:19, 234:7
investigators [2] - 169:17, 208:8	JEFFREY [1] - 5:13	Keith [1] - 171:18	largest [6] - 16:15, 16:24, 27:18, 27:23, 28:11	leaves [1] - 79:25
investigatory [2] - 145:1, 233:3	JENNIFER [1] - 4:12	Kelly [1] - 6:8	Larry [4] - 230:2, 230:6, 230:11, 231:8	led [1] - 19:2
involve [2] - 112:7, 186:23	Jersey [1] - 65:9	Kentucky [3] - 13:3, 14:7, 208:9	last [19] - 21:6, 23:18, 62:7, 62:13, 68:24, 77:25, 94:18, 102:1, 104:9, 111:12, 147:6, 148:25, 184:22, 184:25, 198:6, 205:15, 234:18, 234:23, 237:4	Lee [1] - 3:12
involved [6] - 109:23, 136:16, 136:17, 148:2, 223:8, 230:13	job [11] - 78:12, 136:7, 138:23, 168:20, 201:15, 201:16, 201:20, 217:10, 217:11, 217:12	Joe [6] - 138:5, 138:8, 171:16, 212:24, 213:2	Kermitt [2] - 73:9, 73:12	left [10] - 9:6, 31:8, 101:14, 103:10, 112:15, 135:8, 138:15, 150:13, 157:8, 231:5
involves [4] - 173:22, 173:25, 174:22, 174:24	Johnson [1] - 208:10	Johnson [1] - 4:17	Kessler [1] - 4:17	left-hand [3] - 101:14, 150:13, 157:8
involving [2] - 107:12, 148:23	JOSEPH [1] - 6:4	Juan [2] - 2:5, 2:17	Kevin [4] - 137:14, 137:15, 137:16, 138:2	legal [1] - 185:5
Irpino [1] - 3:7	JR [2] - 2:3, 2:15	judge [4] - 127:8, 127:21, 132:8, 157:2	key [3] - 216:15, 216:17, 216:20	legally [1] - 159:20
irrelevant [1] - 171:9	Juan [2] - 2:5, 2:17	Judge [30] - 7:2, 54:4, 76:9, 78:1, 78:5, 78:11, 79:19, 86:24, 92:23, 98:3, 98:25, 166:16, 181:15, 182:19, 185:7, 194:14, 196:3, 209:8, 210:15, 210:20, 211:8, 222:19, 223:13, 225:25, 226:18, 228:17, 229:13, 232:3, 234:18	kilograms [4] - 46:15, 46:21, 46:23, 108:20	legitimate [8] - 45:11, 157:15, 198:8, 201:1, 216:2, 218:22, 232:12, 233:1
ISIA [1] - 5:4	JUDGE [1] - 1:17	JUDGE [1] - 1:17	kind [4] - 85:4, 86:8, 121:21, 153:15	length [2] - 110:6, 131:6
issue [30] - 69:4, 80:11, 83:20, 84:1, 84:3, 84:7, 88:14, 88:18, 88:22, 88:23, 89:8, 89:22, 94:5, 94:21, 95:4, 97:21, 97:22, 97:23, 124:16, 124:21, 126:6, 126:19, 126:20, 126:22, 161:17, 169:20, 179:23, 191:9, 193:21, 231:3	judges [1] - 35:13	judgment [1] - 101:23	kinds [2] - 106:22, 196:20	leniency [1] - 234:21
Issues [2] - 197:3, 197:9	judicial [1] - 70:6	July [3] - 92:4, 235:2, 235:21	knowing [3] - 12:3, 57:16, 95:18	Leon [2] - 2:4, 2:16
issues [14] - 56:16, 67:8, 77:14, 87:3, 89:14, 90:13, 121:16, 142:2, 169:4, 169:16, 170:1, 180:2, 197:17, 236:20	July [3] - 92:4, 235:2, 235:21	JUDGE [1] - 1:17	knows [5] - 69:18, 95:24, 160:2, 175:14, 200:10	less [6] - 46:20, 92:6, 107:7, 112:17, 112:18, 205:21
issuing [1] - 217:6	judges [1] - 35:13	judgment [1] - 101:23	KOUBA [1] - 3:14	lethal [1] - 218:8
item [2] - 40:5, 110:4	judicial [1] - 70:6	judicial [1] - 70:6	Kreutzer [3] - 137:15, 138:2	letter [26] - 211:22, 212:2, 212:13, 212:18, 213:9, 213:25, 214:19, 214:23, 215:18, 219:18, 219:19, 219:25, 220:1, 220:4, 220:6, 221:17, 221:18, 221:19, 221:22, 229:1, 229:3, 229:5, 231:20, 235:4, 235:13
itemized [1] - 40:6	jurisdiction [7] - 29:7, 29:8, 29:12, 29:17, 33:10, 33:12, 181:9	jurisdictions [2] - 24:4, 50:22	LAW [2] - 127:14, 127:17	Letter [4] - 212:20, 212:23, 222:12, 224:22
items [4] - 111:4, 158:23, 178:6, 204:19	jury [3] - 80:3, 85:14, 88:13	jurisdiction [7] - 29:7, 29:8, 29:12, 29:17, 33:10, 33:12, 181:9	LAURA [1] - 5:10	letters [9] - 190:14, 190:16, 211:12, 211:13, 214:3, 214:14, 222:7, 236:18
iteration [2] - 143:21, 192:13	justification [2] - 204:15, 209:3	jurisdictions [2] - 24:4, 50:22	Laurie [1] - 171:17	letting [1] - 87:22
itself [1] - 36:16	justified [1] - 205:11	justification [2] - 204:15, 209:3	law [17] - 45:10, 50:10, 84:8, 89:23, 92:8, 97:16, 158:8, 165:1, 182:15, 183:6, 183:7, 184:1, 184:5, 189:24, 191:17, 231:8, 233:24	level [9] - 9:16, 10:10, 10:16, 81:8, 119:9, 119:12, 119:14,
J				
Jackson [2] - 6:8, 208:14	Kanawha [2] - 149:20, 208:14	K	law [17] - 45:10, 50:10, 84:8, 89:23, 92:8, 97:16, 158:8, 165:1, 182:15, 183:6, 183:7, 184:1, 184:5, 189:24, 191:17, 231:8, 233:24	learning [1] - 11:19
Janet [1] - 170:13	KEARSE [1] - 4:2	Kanawha [2] - 149:20, 208:14	law [17] - 45:10, 50:10, 84:8, 89:23, 92:8, 97:16, 158:8, 165:1, 182:15, 183:6, 183:7, 184:1, 184:5, 189:24, 191:17, 231:8, 233:24	least [15] - 10:8, 25:18, 27:25, 29:12, 29:17, 33:10, 34:4, 47:3, 59:7, 62:7, 65:2, 65:6, 69:5, 113:10, 197:16
Keegan [1] - 101:18	Keegan [1] - 101:18	Kearse [1] - 4:2	law [17] - 45:10, 50:10, 84:8, 89:23, 92:8, 97:16, 158:8, 165:1, 182:15, 183:6, 183:7, 184:1, 184:5, 189:24, 191:17, 231:8, 233:24	learning [1] - 11:19

187:5, 204:13	live [1] - 174:19	178:4, 178:5, 178:8, 178:13, 184:7, 191:23, 194:20, 204:10	104:19	map [7] - 19:23, 20:2, 20:16, 20:18, 20:24, 21:2, 21:12
levels [5] - 15:12, 15:13, 110:23, 147:8	lived [1] - 52:18		mailed [2] - 212:3, 212:11	Mapes [7] - 133:25, 135:8, 135:9, 139:17, 144:22, 171:18, 235:9
Levin [1] - 2:12	LLC [1] - 2:4		mails [1] - 59:22	March [5] - 38:19, 39:1, 123:20, 124:7, 128:20
LEYIMU [1] - 4:8	load [1] - 129:17		main [2] - 35:1, 76:5	Marcum [2] - 140:23, 140:24
license [19] - 152:22, 152:23, 153:6, 162:10, 176:18, 176:20, 177:14, 181:11, 183:18, 201:12, 217:3, 220:25, 222:2, 222:14, 235:6, 235:12, 235:15, 235:23, 236:2	loaded [3] - 182:17, 200:9, 211:2	133:10, 133:11, 133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7	maintain [19] - 80:12, 92:19, 157:16, 162:23, 164:25, 166:2, 175:20, 184:1, 190:7, 191:5, 191:8, 202:8, 212:8, 217:7, 220:10, 220:13, 222:9, 228:2, 233:25	margin [1] - 18:8
licensed [7] - 65:16, 162:18, 177:21, 179:1, 179:21, 221:10, 236:10	loading [1] - 185:10		maintained [1] - 126:17	MARK [1] - 3:16
licenses [1] - 66:23	local [6] - 67:4, 176:25, 225:15, 225:19, 232:9, 232:25	134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		marked [4] - 76:13, 157:5, 194:16, 228:20
light [2] - 205:15, 205:16	located [3] - 53:7, 54:25, 57:20	133:17, 133:24, 140:6, 141:1, 145:3, 145:6, 151:7		marker [1] - 126:24
likely [1] - 177:18	location [6] - 18:23, 64:14, 197:13, 197:20, 207:25	133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		market [7] - 23:24, 24:2, 98:11, 115:13, 159:9, 180:21, 185:3
limit [3] - 9:19, 46:7, 190:8	locations [2] - 62:23, 63:3	133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		marketing [1] - 151:2
limitations [1] - 95:15	Lockbourne [4] - 150:2, 150:3, 151:7, 227:21	133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		markings [1] - 102:21
limited [2] - 86:6, 210:25	Logan [3] - 6:5, 6:12, 208:15	133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		Marshall [2] - 20:13, 20:18
Lincoln [1] - 208:14	logically [1] - 113:19	133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		Martin [5] - 141:7, 141:9, 171:18, 208:11
LINDA [1] - 4:5	logistics [1] - 62:16	133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		Mason [1] - 208:15
Linden [5] - 229:1, 230:8, 230:11, 231:8, 235:14	logo [5] - 8:9, 150:18, 150:20, 150:24	133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		mass [1] - 212:11
line [11] - 20:1, 33:16, 33:17, 49:24, 64:10, 92:18, 98:23, 139:1, 171:8	look [54] - 8:23, 9:1, 9:5, 10:19, 12:1, 14:19, 14:20, 15:8, 15:16, 16:14, 16:17, 20:8, 20:24, 20:25, 21:6, 27:1, 29:21, 35:8, 36:9, 42:14, 46:13, 49:9, 53:3, 53:25, 54:7, 54:8, 57:4, 73:1, 92:9, 93:16, 96:4, 114:25, 122:18, 134:22, 167:10, 172:11, 178:3, 178:6, 178:7, 197:19, 204:11, 204:19, 206:6, 206:17, 206:20, 208:3, 208:8, 215:18, 223:21, 224:4, 227:8, 229:20	133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		Masters [1] - 167:3
Line [1] - 96:6	looked [12] - 7:23, 11:18, 42:11, 53:10, 74:9, 77:10, 118:25, 130:11, 167:14, 207:5, 207:6, 222:3	133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		match [3] - 94:6, 124:1, 161:14
lines [9] - 7:17, 32:20, 32:22, 33:18, 49:20, 64:9, 86:13, 92:10, 150:25	Looking [1] - 34:12	133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		material [1] - 119:13
link [3] - 21:18, 21:20, 21:21	looking [21] - 15:2, 28:1, 28:2, 40:24, 61:12, 73:5, 76:10, 115:23, 116:3, 119:22, 130:18, 145:19, 172:11	133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		materials [1] - 26:25
links [1] - 21:23		133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		math [2] - 16:25, 54:16
Lisa [2] - 6:18, 238:3		133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		mathematical [1] - 121:11
list [7] - 40:6, 68:16, 78:19, 100:7, 109:22, 227:19		133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		matrix [5] - 12:10, 12:11, 20:8, 22:17, 22:20
listed [5] - 20:11, 26:10, 26:17, 55:9, 103:16		133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		Matt [1] - 171:19
listing [1] - 68:23		133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		matter [9] - 67:25, 97:17, 99:2, 99:4, 109:18, 171:22, 210:1, 211:1, 238:5
literally [8] - 14:4, 28:8, 70:23, 74:6, 92:13, 99:6, 150:19, 220:22		133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		MAY [1] - 1:19
litigation [2] - 163:19, 164:6		133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		Mays [10] - 133:25, 135:21, 139:15, 145:6, 145:8, 145:13, 145:21, 195:10, 195:23, 198:25
Litigation [1] - 230:20		133:17, 133:24, 134:13, 138:15, 138:17, 139:8, 140:6, 141:1, 145:3, 145:6, 151:7		McCann [99] - 7:5, 7:10, 7:16, 8:6, 14:19, 21:3, 23:7, 23:16, 23:22, 26:2, 28:17, 29:23, 36:4, 38:17, 41:22, 42:4,

42:21, 44:15, 52:23, 61:2, 61:5, 63:15, 64:20, 65:14, 66:5, 66:10, 66:12, 66:21, 67:2, 67:6, 67:12, 67:23, 68:3, 68:16, 69:25, 70:11, 70:15, 71:18, 72:9, 73:5, 73:15, 74:18, 74:23, 75:13, 75:24, 76:13, 76:14, 77:16, 78:24, 79:11, 79:25, 81:1, 81:7, 81:11, 85:24, 86:6, 89:17, 92:12, 92:23, 93:10, 94:5, 98:2, 98:9, 99:19, 100:24, 101:4, 101:10, 101:25, 102:7, 102:8, 102:11, 102:16, 102:21, 103:5, 103:20, 103:24, 104:10, 104:17, 105:6, 105:22, 106:11, 106:15, 106:18, 106:20, 110:21, 112:25, 113:4, 117:15, 118:5, 119:7, 120:25, 121:21, 122:12, 122:16, 122:25, 124:10, 125:21, 125:25	McCann's [1] - 102:13 McCloud [12] - 93:7, 94:3, 114:9, 116:22, 116:23, 119:13, 119:17, 119:19, 119:21, 119:23, 120:2, 120:6 MCCLURE [1] - 6:3 MCGINNESS [1] - 4:2 McKesson [26] - 5:8, 12:17, 12:20, 21:1, 22:4, 27:12, 32:22, 33:13, 34:2, 42:19, 42:23, 57:14, 58:6, 67:7, 72:20, 73:5, 73:9, 73:18, 81:3, 81:4, 82:14, 85:23, 103:19, 117:21, 125:1, 158:25 McKesson's [2] - 15:5, 103:10 MDL [6] - 89:13, 99:22, 99:24, 100:15, 164:6, 214:3 MDL-00378501 [1] - 214:7 mean [53] - 22:21,	42:9, 42:13, 49:12, 55:21, 76:20, 78:9, 91:2, 96:20, 98:22, 111:19, 133:2, 135:25, 137:8, 139:3, 140:8, 141:22, 146:1, 149:16, 152:14, 153:24, 154:14, 155:23, 155:24, 160:1, 160:10, 174:5, 176:3, 177:20, 177:23, 178:7, 180:1, 183:6, 184:8, 187:23, 193:11, 193:20, 195:14, 197:23, 200:18, 202:13, 202:20, 204:24, 205:4, 212:10, 221:17, 221:23, 231:2, 231:3, 231:5, 237:8 meaning [2] - 187:15, 199:11 means [7] - 16:7, 63:24, 64:24, 137:9, 170:12, 174:8, 186:20 meant [4] - 64:6, 85:4, 174:4, 236:13 measure [2] - 20:20, 121:5 measured [3] - 113:10, 122:4, 122:6 measuring [1] - 122:9 mechanical [1] - 6:19 mechanics [1] - 196:2 mechanism [1] - 180:10 medical [13] - 10:3, 45:12, 52:15, 66:23, 155:20, 155:21, 157:15, 160:15, 198:9, 198:14, 215:7, 215:10, 218:22 medication [3] - 42:5, 44:21, 45:5 medications [9] - 41:23, 42:22, 43:1, 43:4, 43:20, 44:12, 44:13, 57:9, 57:17 meet [1] - 45:11 meeting [17] - 179:24, 195:12, 195:13, 195:18, 196:1, 196:17, 198:3, 198:21, 198:24, 199:1, 199:7,	224:13, 224:17, 224:22, 225:6, 225:10, 225:19 meetings [2] - 170:9, 194:12 Meigs [1] - 208:12 member [2] - 102:13, 170:6 members [3] - 50:11, 151:19, 213:22 memo [2] - 194:25, 195:4 memorandum [1] - 194:24 memorize [1] - 131:12 memorized [2] - 156:19, 156:22 memory [1] - 134:20 mention [3] - 81:17, 219:22, 221:23 mentioned [2] - 120:25, 204:21 mentions [1] - 221:17 Mercer [1] - 21:2 merely [1] - 113:25 merger [4] - 128:18, 128:20, 149:1, 150:22 merging [1] - 125:16 merry [1] - 210:15 merry-go-round [1] - 210:15 message [1] - 230:1 met [4] - 188:22, 189:3, 213:2, 225:5 Methadone [2] - 169:20, 169:22 Methamphetamine [3] - 169:8, 169:14, 170:5 methamphetamine [1] - 169:15 method [2] - 197:13, 197:19 metrics [1] - 92:8 Metro [1] - 52:14 Miami [4] - 27:8, 27:14, 72:24, 109:8 Miami-Luken [3] - 27:8, 27:14, 72:24 MICHAEL [2] - 2:15, 3:9 Michael [1] - 171:18 micrograms [1] - 108:20 mighty [11] - 22:10, 22:11, 22:24, 24:20, 62:15, 94:3, 98:5, 123:17, 124:3, 124:4, 218:21	Mike [6] - 133:25, 135:8, 135:9, 139:17, 144:22, 235:8 MILDRED [1] - 3:3 miles [1] - 21:14 million [17] - 14:22, 14:25, 41:18, 72:21, 73:6, 73:8, 73:9, 73:12, 86:13, 106:2, 108:10, 108:21, 129:19, 183:25, 223:23, 224:6, 224:15 month [13] - 9:11, 37:19, 92:5, 93:9, 114:10, 114:11, 119:24, 120:3, 120:4, 120:14, 128:24 monthly [6] - 14:7, 15:9, 16:16, 73:24, 73:25, 131:9 months [9] - 84:1, 88:6, 88:20, 88:22, 88:23, 92:3, 92:6, 92:11, 223:23 moons [1] - 61:6 moots [1] - 75:15 morbidity [4] - 174:1, 174:5, 174:8, 174:11 Morgan [1] - 101:18 morning [12] - 7:10, 7:11, 23:16, 23:17, 53:11, 66:5, 66:6, 66:7, 70:25, 86:8, 90:23, 237:16 Morris [1] - 6:15 mortality [2] - 174:10, 174:24 most [12] - 36:14, 37:23, 67:14, 68:5, 70:19, 74:24, 81:2, 111:22, 111:25, 129:5, 148:19, 216:15 motion [2] - 101:2, 101:3 Motley [5] - 2:9, 3:14, 4:3, 4:5, 4:8 MOU [1] - 228:10 Mougey [13] - 50:21, 69:2, 69:20, 72:11, 75:21, 81:11, 81:24, 85:25, 89:8, 91:6, 98:6, 98:22, 120:19 MOUGEY [57] - 2:12, 11:3, 11:10, 66:4, 66:9, 67:22, 68:10, 68:15, 69:3, 69:23, 70:5, 70:10, 72:3, 72:12, 74:15, 74:17, 74:22, 75:12, 75:22, 75:23, 77:3, 77:5, 78:11, 78:14, 79:13, 79:16, 81:21, 81:25, 83:11, 83:24, 84:9, 84:18, 84:24, 85:13, 85:19, 86:7, 87:25, 88:5, 90:5, 90:12, 90:17, 93:25, 98:3, 98:7, 98:8, 98:24, 101:6, 101:8, 102:19, 102:20,
--	---	---	---	---

105:15, 106:8, 120:17, 120:20, 120:23, 123:8, 125:19 Mougey's [3] - 26:22, 80:23, 111:2 Moundsville [1] - 20:10 Mountain [1] - 207:15 move [13] - 11:2, 11:13, 11:23, 81:24, 81:25, 82:6, 104:17, 121:5, 121:9, 126:15, 129:4, 165:18, 223:13 moved [3] - 11:11, 37:10, 141:18 movement [1] - 169:7 moving [7] - 38:17, 44:15, 61:2, 82:9, 127:9, 138:15, 166:2 MR [302] - 2:3, 2:6, 2:9, 2:12, 2:15, 3:9, 3:11, 3:16, 4:17, 5:9, 5:10, 5:13, 6:4, 7:8, 7:12, 7:14, 7:15, 8:1, 8:4, 8:5, 11:1, 11:3, 11:10, 11:14, 11:17, 11:22, 11:25, 12:7, 12:9, 66:4, 66:9, 67:18, 67:22, 68:10, 68:15, 68:22, 69:3, 69:16, 69:23, 70:5, 70:10, 71:23, 72:3, 72:5, 72:12, 74:15, 74:17, 74:22, 75:12, 75:14, 75:17, 75:22, 75:23, 76:22, 77:3, 77:5, 78:7, 78:11, 78:14, 79:13, 79:16, 80:8, 80:22, 81:21, 81:25, 83:8, 83:11, 83:12, 83:17, 83:24, 84:9, 84:14, 84:18, 84:20, 84:24, 85:8, 85:10, 85:13, 85:19, 85:20, 86:7, 87:10, 87:25, 88:1, 88:5, 88:21, 90:4, 90:5, 90:9, 90:12, 90:17, 90:18, 90:20, 91:8, 91:13, 91:22, 93:5, 93:25, 95:10, 95:11, 96:2, 96:11, 96:15, 96:16, 96:22, 97:20, 97:24, 97:25, 98:3, 98:7, 98:8, 98:24, 101:6, 101:8, 102:19, 102:20, 105:13, 105:15,	106:8, 106:10, 106:14, 112:23, 113:3, 113:5, 113:7, 116:17, 116:21, 117:20, 117:24, 118:3, 118:15, 119:3, 120:17, 120:20, 120:23, 123:8, 124:13, 124:16, 124:25, 125:8, 125:14, 125:15, 125:19, 125:22, 125:24, 126:17, 127:2, 127:6, 127:21, 128:1, 129:23, 130:2, 130:10, 131:23, 131:25, 132:3, 132:10, 133:1, 133:13, 134:2, 134:9, 134:10, 137:23, 146:24, 153:14, 153:17, 153:18, 156:7, 156:11, 156:14, 156:15, 157:2, 157:4, 158:4, 159:22, 159:24, 160:3, 160:5, 160:8, 160:13, 164:23, 165:2, 165:6, 165:12, 165:14, 165:19, 166:6, 166:10, 166:14, 166:16, 166:19, 166:23, 167:1, 167:4, 167:9, 171:4, 171:14, 172:6, 174:3, 174:7, 175:5, 175:9, 175:13, 175:17, 176:1, 176:4, 179:11, 179:14, 180:17, 180:19, 181:17, 181:21, 182:9, 182:16, 182:19, 183:2, 183:8, 183:23, 184:16, 184:24, 185:7, 185:14, 185:16, 185:17, 187:22, 188:2, 189:10, 189:14, 190:13, 190:21, 190:25, 191:3, 193:7, 193:13, 194:14, 194:15, 196:3, 196:12, 196:14, 196:21, 200:8, 200:13, 203:18, 205:14, 205:20,	205:24, 205:25, 207:7, 207:9, 207:13, 208:17, 209:1, 209:8, 209:10, 209:15, 209:18, 209:21, 209:25, 210:5, 210:9, 210:14, 210:19, 211:3, 211:4, 211:7, 211:10, 211:12, 211:16, 216:8, 216:9, 216:13, 221:2, 221:6, 221:7, 222:21, 223:13, 223:15, 223:17, 223:18, 223:20, 225:25, 226:2, 226:18, 226:21, 226:22, 226:25, 227:4, 228:17, 228:19, 229:13, 229:16, 229:17, 229:19, 232:2, 232:4, 234:2, 234:5, 234:17, 234:20, 234:22, 237:12, 237:17 MS [47] - 3:3, 3:6, 3:14, 4:2, 4:5, 4:8, 4:12, 4:12, 4:15, 5:3, 5:4, 5:10, 6:3, 6:7, 6:14, 23:10, 23:15, 35:15, 35:19, 35:23, 35:25, 36:2, 54:3, 54:6, 54:10, 54:12, 55:19, 56:17, 57:2, 63:20, 64:3, 64:18, 64:19, 65:24, 74:19, 75:8, 83:15, 106:17, 119:6, 120:16, 125:2, 125:18, 125:23, 126:25, 185:4, 210:22, 227:1 Mt [3] - 3:15, 4:4, 4:9 multiple [2] - 11:5, 16:1 multitude [3] - 144:25, 184:9, 202:17 must [6] - 78:11, 150:6, 153:9, 216:2, 216:4, 216:23	214:5 named [1] - 8:13 names [8] - 8:19, 62:23, 63:3, 135:2, 139:25, 143:15, 143:24, 150:24 narcotic [2] - 162:11 narcotics [3] - 154:9, 154:11, 154:17 narrow [8] - 40:7, 72:1, 72:4, 79:2, 82:3, 112:1, 112:9, 112:10 narrowed [1] - 71:21 narrowing [2] - 113:11, 113:20 narrowly [1] - 42:9 narrows [1] - 112:3 nation [2] - 111:25, 215:1 national [19] - 9:11, 12:20, 13:8, 13:9, 15:18, 16:21, 17:5, 17:8, 17:9, 17:11, 17:13, 17:16, 18:7, 18:12, 18:18, 22:20, 62:16, 189:17, 233:3 nationally [3] - 15:14, 115:23, 159:10 nationwide [5] - 92:19, 187:13, 188:10, 189:5, 235:18 NDC [5] - 109:19, 115:1, 115:5, 115:7, 115:11 near [1] - 150:5 nearby [1] - 14:6 necessary [2] - 123:25, 157:15 need [27] - 35:12, 45:12, 84:7, 84:10, 84:13, 84:15, 87:5, 91:20, 92:13, 92:17, 97:15, 97:16, 117:13, 132:1, 132:6, 142:2, 153:4, 160:6, 162:9, 183:12, 199:19, 201:2, 210:19, 232:5, 232:17, 232:21, 232:22 needed [5] - 45:11, 79:15, 81:19, 197:19, 236:9 needs [5] - 35:7, 78:4, 87:13, 127:15, 171:23 negative [2] - 93:18, 181:20
		N	
		name [13] - 8:20, 35:22, 64:14, 128:2, 128:4, 136:4, 136:18, 138:6, 140:3, 141:6, 141:19, 170:22,	

<p>216:8, 221:2, 223:15, 223:18, 226:21, 229:16, 237:12 Nicole [2] - 139:2, 139:22 night [1] - 68:24 Ninth [1] - 4:6 nomenclature [1] - 137:24 non [16] - 18:6, 20:10, 33:8, 43:20, 43:21, 43:25, 57:5, 57:19, 57:22, 58:20, 138:24, 197:14, 197:21, 215:7, 215:10 non-ARCOS [1] - 33:8 non-controlled [7] - 43:20, 43:21, 43:25, 57:5, 57:19, 197:14, 197:21 non-distribution [1] - 138:24 non-Huntington [2] - 18:6, 20:10 non-medical [2] - 215:7, 215:10 non-opioid [1] - 43:21 non-pharmacy [2] - 57:22, 58:20 none [8] - 63:21, 64:21, 108:22, 111:4, 111:7, 111:10, 111:15 nonetheless [1] - 218:3 Nonetheless [2] - 218:6, 234:7 noon [1] - 97:17 normal [2] - 129:6, 130:20 North [1] - 140:23 Northern [2] - 53:20, 53:23 notations [1] - 103:17 note [3] - 74:19, 91:8, 102:10 noted [2] - 225:20, 230:1 notes [2] - 128:13, 143:22 nothing [4] - 69:18, 94:7, 94:18, 102:12 notice [15] - 67:8, 67:24, 68:4, 69:4, 70:6, 164:7, 199:6, 210:1, 210:2, 210:25, 213:10, 219:8, 221:9,</p>	<p>221:13, 221:24 noting [1] - 75:8 notwithstanding [1] - 232:12 NPI [14] - 103:5, 103:6, 103:24, 104:2, 104:5, 104:11, 104:21, 105:10, 105:16, 105:18, 105:21, 106:2, 118:25, 119:1 number [44] - 9:7, 12:23, 14:21, 14:25, 22:7, 22:9, 22:10, 22:11, 22:19, 40:5, 40:20, 41:1, 41:9, 52:3, 52:24, 63:4, 63:13, 64:13, 72:23, 93:19, 94:8, 94:9, 99:21, 100:21, 104:12, 104:14, 104:18, 104:22, 105:8, 107:1, 107:7, 108:16, 112:23, 122:18, 130:7, 130:24, 131:5, 131:21, 148:22, 149:5, 151:12, 167:23 Number [4] - 176:21, 181:22, 212:20, 212:23 numbers [32] - 9:6, 9:15, 14:18, 14:20, 15:2, 16:17, 17:5, 17:23, 22:8, 63:6, 63:22, 64:22, 81:2, 81:3, 81:18, 85:1, 93:18, 103:11, 103:14, 105:3, 107:19, 116:5, 117:17, 117:18, 131:4, 131:11, 134:12, 207:19, 208:1, 209:6, 214:6, 214:12 numerical [1] - 121:22 numerous [3] - 57:24, 58:22, 59:2 NW [6] - 2:10, 4:6, 4:13, 4:15, 5:5, 5:12 NY [1] - 3:5</p> <p style="text-align: center;">O</p> <p>oar [1] - 83:13 oath [2] - 164:12, 172:2 obesity [1] - 204:12 object [40] - 11:3,</p>	<p>56:17, 68:22, 71:23, 75:20, 80:18, 84:25, 96:8, 129:23, 133:1, 153:14, 156:7, 165:2, 165:3, 166:6, 167:4, 171:4, 171:5, 174:3, 179:11, 182:1, 184:18, 187:22, 187:23, 189:10, 193:8, 200:8, 205:14, 205:17, 208:17, 209:21, 210:5, 210:9, 210:22, 216:9, 221:2, 237:12 Object [4] - 176:1, 182:16, 200:8, 234:2 objected [5] - 79:19, 79:22, 80:3, 92:1, 210:16 objecting [3] - 75:18, 78:25, 184:17 objection [50] - 69:17, 69:22, 70:2, 70:4, 75:15, 77:11, 81:24, 85:3, 86:9, 87:9, 129:23, 130:9, 131:24, 133:12, 134:3, 134:7, 159:22, 160:8, 165:5, 165:12, 166:9, 166:14, 171:13, 175:6, 175:13, 179:16, 182:7, 184:19, 184:23, 185:15, 189:13, 196:10, 196:13, 205:22, 209:11, 209:20, 210:8, 223:15, 223:16, 223:17, 223:18, 226:20, 226:21, 226:25, 227:1, 227:2, 229:15, 229:16, 229:17 Objection [5] - 175:5, 185:4, 189:10, 193:7, 207:7 objection's [1] - 70:9 objections [5] - 82:3, 126:16, 126:18, 126:25, 127:2 objective [3] - 109:12, 110:8, 125:10 obligation [3] - 179:3, 186:9, 186:24 obligations [2] - 195:21, 203:4 Obligations [1] -</p> <p>once [12] - 18:5, 98:17, 99:1, 99:7, 112:13, 122:20, 153:7, 162:17, 163:6, 201:19, 219:21, 236:1 one [147] - 8:17, 9:5, 14:19, 16:20, 17:11, 17:12, 17:16, 17:19, 17:25, 19:12, 19:14, 21:6, 21:8, 22:2, 22:9, 22:25, 23:3, 24:6, 26:6, 28:11, 29:19, 34:20, 35:8, 35:13, 36:6, 40:13, 46:3, 46:13, 47:11, 50:15, 54:11, 60:21, 61:1, 69:13, 69:15, 71:20, 71:21, 72:25, 73:2, 73:17, 73:23, 74:2, 77:14, 78:18, 78:24, 82:6, 83:13, 83:17, 85:21, 86:16, 86:17, 92:8, 92:17, 92:21, 93:8, 93:11, 94:5, 94:8, 95:10, 96:25, 104:17, 106:24, 107:7, 108:4, 108:5, 108:17, 108:18, 110:2, 110:5, 111:3, 112:18, 114:3, 114:9, 114:23, 116:4, 121:7, 122:1, 122:3, 122:4, 122:11, 123:5, 134:18, 136:16, 140:18, 140:20, 141:2, 141:6, 141:14, 141:19, 141:21, 142:16, 142:24, 143:7, 144:1, 147:11, 147:20, 149:12, 151:1, 151:4, 158:21, 158:23, 158:25, 159:3, 164:3, 169:8, 170:6, 170:7, 172:14, 176:21, 177:3, 180:6, 182:13, 183:11, 187:2, 187:5, 187:8, 189:19, 192:9, 195:25, 196:17, 197:3, 202:17, 204:19, 205:9, 206:6, 206:17, 206:18, 208:3, 210:15, 216:14, 216:17, 216:21,</p>
---	---	---

218:8, 221:12, 222:8, 222:13, 227:20, 227:21, 229:25, 234:20, 236:7	opioids [23] - 9:20, 25:8, 25:14, 28:18, 40:7, 45:2, 45:16, 45:20, 45:25, 50:22, 55:11, 107:14, 107:16, 109:19, 110:23, 154:2, 158:23, 160:11, 161:8, 161:12, 175:21, 195:19, 204:13	166:13, 167:12, 172:11, 176:22, 176:24, 177:2, 179:2, 179:3, 179:10, 179:17, 180:3, 180:8, 180:15, 180:16, 186:8, 186:11, 197:12, 197:18, 200:1, 200:15, 201:16, 202:5, 202:13, 205:11, 212:9, 218:19, 218:21, 219:12, 222:5, 232:10, 232:16, 232:25, 233:7, 233:13, 233:21, 234:8, 234:12, 234:14, 234:24, 236:14, 237:7, 237:8	P-44711 [2] - 29:22, 48:11 P-44748 [1] - 35:10 P-44752 [2] - 26:7, 31:7 P-44758 [1] - 92:9 P-4478 [1] - 36:9 P-49 [2] - 222:22, 223:13 P-877 [2] - 228:20, 229:13 P-9 [2] - 226:3, 226:19 P-9112 [3] - 194:17, 196:3, 197:7 P-9112a [2] - 196:8, 209:19 p.m [1] - 237:19 P.O [2] - 5:14, 6:8 PA [3] - 6:6, 6:13, 6:15 package [5] - 64:10, 70:23, 71:5, 72:17, 115:11 packages [5] - 70:19, 70:21, 71:4, 71:15, 80:6 packet [9] - 70:12, 74:2, 74:5, 74:10, 78:4, 81:11, 86:2, 92:9, 105:20 packets [27] - 54:21, 71:21, 72:16, 72:22, 73:16, 73:17, 73:23, 74:20, 74:25, 75:5, 75:9, 77:10, 77:12, 77:21, 78:16, 78:19, 79:21, 80:2, 82:1, 82:6, 82:18, 86:16, 86:17, 86:22, 87:7, 92:20
one [6] - 5:11, 13:2, 13:3, 23:10, 184:8, 237:4	opium [1] - 154:11	overlapped [1] - 123:13	P-44711 [2] - 29:22, 48:11 P-44748 [1] - 35:10 P-44752 [2] - 26:7, 31:7 P-44758 [1] - 92:9 P-4478 [1] - 36:9 P-49 [2] - 222:22, 223:13 P-877 [2] - 228:20, 229:13 P-9 [2] - 226:3, 226:19 P-9112 [3] - 194:17, 196:3, 197:7 P-9112a [2] - 196:8, 209:19 p.m [1] - 237:19 P.O [2] - 5:14, 6:8 PA [3] - 6:6, 6:13, 6:15 package [5] - 64:10, 70:23, 71:5, 72:17, 115:11 packages [5] - 70:19, 70:21, 71:4, 71:15, 80:6 packet [9] - 70:12, 74:2, 74:5, 74:10, 78:4, 81:11, 86:2, 92:9, 105:20 packets [27] - 54:21, 71:21, 72:16, 72:22, 73:16, 73:17, 73:23, 74:20, 74:25, 75:5, 75:9, 77:10, 77:12, 77:21, 78:16, 78:19, 79:21, 80:2, 82:1, 82:6, 82:18, 86:16, 86:17, 86:22, 87:7, 92:20
one-half [1] - 116:4	opposed [2] - 11:11, 29:19	override [1] - 201:7	P-44711 [2] - 29:22, 48:11 P-44748 [1] - 35:10 P-44752 [2] - 26:7, 31:7 P-44758 [1] - 92:9 P-4478 [1] - 36:9 P-49 [2] - 222:22, 223:13 P-877 [2] - 228:20, 229:13 P-9 [2] - 226:3, 226:19 P-9112 [3] - 194:17, 196:3, 197:7 P-9112a [2] - 196:8, 209:19 p.m [1] - 237:19 P.O [2] - 5:14, 6:8 PA [3] - 6:6, 6:13, 6:15 package [5] - 64:10, 70:23, 71:5, 72:17, 115:11 packages [5] - 70:19, 70:21, 71:4, 71:15, 80:6 packet [9] - 70:12, 74:2, 74:5, 74:10, 78:4, 81:11, 86:2, 92:9, 105:20 packets [27] - 54:21, 71:21, 72:16, 72:22, 73:16, 73:17, 73:23, 74:20, 74:25, 75:5, 75:9, 77:10, 77:12, 77:21, 78:16, 78:19, 79:21, 80:2, 82:1, 82:6, 82:18, 86:16, 86:17, 86:22, 87:7, 92:20
ones [12] - 13:19, 14:11, 14:12, 14:14, 49:20, 55:23, 85:25, 141:18, 153:22, 168:9, 192:17	opposite [2] - 59:11, 121:9	overrule [6] - 56:20, 67:20, 133:12, 179:16, 182:6, 209:11	P-44711 [2] - 29:22, 48:11 P-44748 [1] - 35:10 P-44752 [2] - 26:7, 31:7 P-44758 [1] - 92:9 P-4478 [1] - 36:9 P-49 [2] - 222:22, 223:13 P-877 [2] - 228:20, 229:13 P-9 [2] - 226:3, 226:19 P-9112 [3] - 194:17, 196:3, 197:7 P-9112a [2] - 196:8, 209:19 p.m [1] - 237:19 P.O [2] - 5:14, 6:8 PA [3] - 6:6, 6:13, 6:15 package [5] - 64:10, 70:23, 71:5, 72:17, 115:11 packages [5] - 70:19, 70:21, 71:4, 71:15, 80:6 packet [9] - 70:12, 74:2, 74:5, 74:10, 78:4, 81:11, 86:2, 92:9, 105:20 packets [27] - 54:21, 71:21, 72:16, 72:22, 73:16, 73:17, 73:23, 74:20, 74:25, 75:5, 75:9, 77:10, 77:12, 77:21, 78:16, 78:19, 79:21, 80:2, 82:1, 82:6, 82:18, 86:16, 86:17, 86:22, 87:7, 92:20
open [5] - 98:22, 164:22, 166:25, 183:11, 236:24	orange [3] - 36:16, 36:19, 49:20	overruled [3] - 11:8, 176:2, 193:9	P-44711 [2] - 29:22, 48:11 P-44748 [1] - 35:10 P-44752 [2] - 26:7, 31:7 P-44758 [1] - 92:9 P-4478 [1] - 36:9 P-49 [2] - 222:22, 223:13 P-877 [2] - 228:20, 229:13 P-9 [2] - 226:3, 226:19 P-9112 [3] - 194:17, 196:3, 197:7 P-9112a [2] - 196:8, 209:19 p.m [1] - 237:19 P.O [2] - 5:14, 6:8 PA [3] - 6:6, 6:13, 6:15 package [5] - 64:10, 70:23, 71:5, 72:17, 115:11 packages [5] - 70:19, 70:21, 71:4, 71:15, 80:6 packet [9] - 70:12, 74:2, 74:5, 74:10, 78:4, 81:11, 86:2, 92:9, 105:20 packets [27] - 54:21, 71:21, 72:16, 72:22, 73:16, 73:17, 73:23, 74:20, 74:25, 75:5, 75:9, 77:10, 77:12, 77:21, 78:16, 78:19, 79:21, 80:2, 82:1, 82:6, 82:18, 86:16, 86:17, 86:22, 87:7, 92:20
open-ended [1] - 183:11	orchard [1] - 16:19	oversight [1] - 137:9	P-44711 [2] - 29:22, 48:11 P-44748 [1] - 35:10 P-44752 [2] - 26:7, 31:7 P-44758 [1] - 92:9 P-4478 [1] - 36:9 P-49 [2] - 222:22, 223:13 P-877 [2] - 228:20, 229:13 P-9 [2] - 226:3, 226:19 P-9112 [3] - 194:17, 196:3, 197:7 P-9112a [2] - 196:8, 209:19 p.m [1] - 237:19 P.O [2] - 5:14, 6:8 PA [3] - 6:6, 6:13, 6:15 package [5] - 64:10, 70:23, 71:5, 72:17, 115:11 packages [5] - 70:19, 70:21, 71:4, 71:15, 80:6 packet [9] - 70:12, 74:2, 74:5, 74:10, 78:4, 81:11, 86:2, 92:9, 105:20 packets [27] - 54:21, 71:21, 72:16, 72:22, 73:16, 73:17, 73:23, 74:20, 74:25, 75:5, 75:9, 77:10, 77:12, 77:21, 78:16, 78:19, 79:21, 80:2, 82:1, 82:6, 82:18, 86:16, 86:17, 86:22, 87:7, 92:20
opening [4] - 204:20, 205:7, 205:17	order [14] - 145:24, 168:12, 177:13, 187:10, 189:16, 190:15, 222:17, 223:9, 224:13, 225:2, 225:5, 226:7, 226:16, 231:24	oversees [1] - 140:11	P-44711 [2] - 29:22, 48:11 P-44748 [1] - 35:10 P-44752 [2] - 26:7, 31:7 P-44758 [1] - 92:9 P-4478 [1] - 36:9 P-49 [2] - 222:22, 223:13 P-877 [2] - 228:20, 229:13 P-9 [2] - 226:3, 226:19 P-9112 [3] - 194:17, 196:3, 197:7 P-9112a [2] - 196:8, 209:19 p.m [1] - 237:19 P.O [2] - 5:14, 6:8 PA [3] - 6:6, 6:13, 6:15 package [5] - 64:10, 70:23, 71:5, 72:17, 115:11 packages [5] - 70:19, 70:21, 71:4, 71:15, 80:6 packet [9] - 70:12, 74:2, 74:5, 74:10, 78:4, 81:11, 86:2, 92:9, 105:20 packets [27] - 54:21, 71:21, 72:16, 72:22, 73:16, 73:17, 73:23, 74:20, 74:25, 75:5, 75:9, 77:10, 77:12, 77:21, 78:16, 78:19, 79:21, 80:2, 82:1, 82:6, 82:18, 86:16, 86:17, 86:22, 87:7, 92:20
operate [3] - 163:11, 178:23, 186:10	order [1] - 11:1, 12:11	overstated [1] - 93:9	P-44711 [2] - 29:22, 48:11 P-44748 [1] - 35:10 P-44752 [2] - 26:7, 31:7 P-44758 [1] - 92:9 P-4478 [1] - 36:9 P-49 [2] - 222:22, 223:13 P-877 [2] - 228:20, 229:13 P-9 [2] - 226:3, 226:19 P-9112 [3] - 194:17, 196:3, 197:7 P-9112a [2] - 196:8, 209:19 p.m [1] - 237:19 P.O [2] - 5:14, 6:8 PA [3] - 6:6, 6:13, 6:15 package [5] - 64:10, 70:23, 71:5, 72:17, 115:11 packages [5] - 70:19, 70:21, 71:4, 71:15, 80:6 packet [9] - 70:12, 74:2, 74:5, 74:10, 78:4, 81:11, 86:2, 92:9, 105:20 packets [27] - 54:21, 71:21, 72:16, 72:22, 73:16, 73:17, 73:23, 74:20, 74:25, 75:5, 75:9, 77:10, 77:12, 77:21, 78:16, 78:19, 79:21, 80:2, 82:1, 82:6, 82:18, 86:16, 86:17, 86:22, 87:7, 92:20
operated [2] - 148:22, 188:5	organized [1] - 83:1	own [8] - 25:20, 34:24, 42:15, 89:5, 152:17, 152:19, 152:20, 152:21	P-44711 [2] - 29:22, 48:11 P-44748 [1] - 35:10 P-44752 [2] - 26:7, 31:7 P-44758 [1] - 92:9 P-4478 [1] - 36:9 P-49 [2] - 222:22, 223:13 P-877 [2] - 228:20, 229:13 P-9 [2] - 226:3, 226:19 P-9112 [3] - 194:17, 196:3, 197:7 P-9112a [2] - 196:8, 209:19 p.m [1] - 237:19 P.O [2] - 5:14, 6:8 PA [3] - 6:6, 6:13, 6:15 package [5] - 64:10, 70:23, 71:5, 72:17, 115:11 packages [5] - 70:19, 70:21, 71:4, 71:15, 80:6 packet [9] - 70:12, 74:2, 74:5, 74:10, 78:4, 81:11, 86:2, 92:9, 105:20 packets [27] - 54:21, 71:21, 72:16, 72:22, 73:16, 73:17, 73:23, 74:20, 74:25, 75:5, 75:9, 77:10, 77:12, 77:21, 78:16, 78:19, 79:21, 80:2, 82:1, 82:6, 82:18, 86:16, 86:17, 86:22, 87:7, 92:20
opiates [10] - 66:24, 67:10, 158:17, 158:22, 159:20, 162:1, 165:11, 175:4, 175:12, 180:20	outlined [2] - 162:6, 231:23	owned [1] - 30:20	P-44711 [2] - 29:22, 48:11 P-44748 [1] - 35:10 P-44752 [2] - 26:7, 31:7 P-44758 [1] - 92:9 P-4478 [1] - 36:9 P-49 [2] - 222:22, 223:13 P-877 [2] - 228:20, 229:13 P-9 [2] - 226:3, 226:19 P-9112 [3] - 194:17, 196:3, 197:7 P-9112a [2] - 196:8, 209:19 p.m [1] - 237:19 P.O [2] - 5:14, 6:8 PA [3] - 6:6, 6:13, 6:15 package [5] - 64:10, 70:23, 71:5, 72:17, 115:11 packages [5] - 70:19, 70:21, 71:4, 71:15, 80:6 packet [9] - 70:12, 74:2, 74:5, 74:10, 78:4, 81:11, 86:2, 92:9, 105:20 packets [27] - 54:21, 71:21, 72:16, 72:22, 73:16, 73:17, 73:23, 74:20, 74:25, 75:5, 75:9, 77:10, 77:12, 77:21, 78:16, 78:19, 79:21, 80:2, 82:1, 82:6, 82:18, 86:16, 86:17, 86:22, 87:7, 92:20
opinion [7] - 100:25, 101:1, 101:2, 101:3, 101:10, 236:18, 236:19	ordering [3] - 29:13, 29:14, 29:18	outside [35] - 12:23, 13:1, 16:8, 16:12, 17:11, 17:13, 17:16, 17:19, 18:25, 21:18, 21:25, 22:16, 52:19, 52:24, 53:4, 54:8, 54:20, 54:25, 55:4, 56:5, 57:3, 57:20, 58:10, 60:19, 60:24, 67:18, 68:23, 98:3, 110:12, 111:5, 122:25, 126:21, 142:9, 201:21	Oxycodone [1] - 129:20
opinions [4] - 27:16, 27:21, 110:23, 236:21	Orders [2] - 199:19, 199:21	Oxycontin [10] - 192:20, 192:21, 192:22, 192:24, 193:1, 193:5, 193:16, 193:22, 194:1, 194:8	P-44711 [2] - 29:22, 48:11 P-44748 [1] - 35:10 P-44752 [2] - 26:7, 31:7 P-44758 [1] - 92:9 P-4478 [1] - 36:9 P-49 [2] - 222:22, 223:13 P-877 [2] -

47:21, 48:11, 51:15, 53:2, 71:18, 71:19, 72:13, 73:17, 73:21, 96:3, 96:4, 96:5, 101:11, 101:25, 102:8, 102:17, 102:22, 103:13, 103:14, 103:20, 103:25, 105:6, 132:23, 197:1, 197:2, 197:8, 199:18, 202:23, 211:17, 217:21, 217:22, 224:12, 226:23, 227:5, 227:24	participated [1] - 170:10 particular [26] - 13:6, 22:7, 26:9, 27:1, 28:18, 28:19, 29:6, 29:9, 29:12, 30:17, 40:24, 61:4, 96:23, 99:11, 114:10, 119:12, 119:22, 119:24, 120:13, 120:14, 141:6, 198:8, 206:2, 207:25	158:3, 168:16, 171:7, 186:23, 196:17, 205:1, 217:18 people's [2] - 122:6, 168:8 per [15] - 10:6, 29:24, 50:22, 50:25, 51:2, 51:6, 51:16, 52:1, 69:10, 94:13, 103:1, 116:7, 117:11, 117:12, 117:17	PETER [1] - 2:12 Pharmaceutical [1] - 167:3 Pharmacies [10] - 30:25, 31:9, 32:3, 32:4, 36:7, 36:12, 36:15, 37:4, 37:25, 179:21 pharmacies [142] - 12:21, 12:22, 12:23, 13:1, 13:12, 13:14, 13:18, 14:5, 15:6, 15:25, 16:1, 16:2, 16:3, 16:8, 16:11, 16:15, 16:16, 18:6, 18:10, 18:16, 18:20, 18:23, 19:3, 19:8, 19:13, 21:8, 21:17, 21:19, 21:25, 22:2, 22:5, 22:16, 22:20, 26:3, 28:6, 28:19, 29:4, 30:16, 31:20, 34:24, 35:4, 38:2, 38:14, 52:4, 52:24, 53:3, 53:6, 53:7, 53:12, 53:19, 54:9, 54:13, 54:20, 54:25, 55:4, 55:8, 55:12, 55:21, 55:22, 55:24, 56:5, 56:8, 56:13, 56:21, 57:3, 57:6, 57:18, 57:19, 57:22, 58:19, 59:23, 66:14, 66:19, 67:2, 67:9, 67:13, 70:13, 71:2, 71:14, 73:3, 73:24, 74:3, 76:20, 78:4, 78:9, 78:17, 79:7, 79:21, 86:16, 94:11, 103:3, 103:6, 103:7, 103:16, 103:18, 103:25, 104:6, 104:7, 104:19, 104:24, 105:5, 105:25, 110:11, 111:5, 112:4, 112:7, 112:10, 119:1, 122:25, 123:3, 123:5, 123:6, 126:21, 129:20, 130:19, 149:24, 152:20, 158:22, 159:14, 159:21, 160:11, 162:8, 162:9, 163:10, 163:15, 163:17, 169:22, 177:21, 177:22, 198:15, 202:24, 203:7, 203:13, 203:16, 217:7, 217:11,	217:12, 224:15, 225:16, 225:20 pharmacist [1] - 201:24 pharmacy [104] - 10:22, 20:10, 20:11, 21:1, 21:7, 21:9, 26:23, 28:3, 28:21, 30:21, 34:23, 44:9, 54:21, 57:22, 58:20, 63:17, 64:6, 64:7, 64:12, 64:14, 65:15, 65:21, 70:23, 70:24, 71:4, 71:5, 71:21, 72:16, 72:19, 73:9, 73:16, 73:17, 73:23, 74:6, 74:8, 74:11, 74:20, 74:21, 74:23, 75:6, 75:10, 75:24, 76:4, 76:10, 76:20, 77:9, 77:21, 78:3, 79:7, 80:3, 80:25, 82:1, 86:17, 93:14, 94:10, 99:6, 99:9, 115:1, 115:8, 115:9, 116:23, 118:25, 119:12, 119:15, 120:13, 131:2, 153:9, 159:17, 160:20, 160:24, 161:11, 161:17, 162:3, 162:18, 172:12, 172:18, 178:1, 178:20, 179:1, 179:23, 180:13, 180:14, 181:3, 191:12, 191:24, 197:13, 197:19, 201:3, 201:5, 201:11, 201:24, 201:25, 203:5, 203:23, 204:17, 221:15, 223:23, 224:5
Pages [9] - 13:6, 43:7, 71:1, 71:15, 71:17, 71:25, 81:17, 82:4, 196:8	Pages [1] - 214:16			
pain [2] - 51:22, 204:17				
pair [2] - 121:25, 122:2				
Panel [1] - 170:5				
panel [1] - 101:20				
Panhandle [4] - 53:12, 53:17, 53:20, 53:23				
panhandles [2] - 54:1, 54:11				
Papantonio [1] - 2:12				
paper [4] - 84:6, 95:1, 95:25, 96:14				
papers [1] - 127:9				
paragraph [19] - 101:14, 214:18, 215:2, 215:21, 218:3, 218:5, 218:16, 218:17, 218:18, 220:8, 229:20, 229:25, 231:11, 232:1, 232:7, 232:18, 232:25, 234:14, 234:23				
Paragraph [8] - 40:10, 40:24, 41:3, 157:19, 223:21, 224:4, 227:8, 228:1				
Pardon [1] - 211:9				
part [21] - 9:18, 23:22, 26:24, 29:12, 29:18, 39:11, 51:13, 56:3, 56:10, 59:15, 89:17, 109:12, 112:6, 129:6, 130:20, 147:25, 176:17, 177:11, 181:10, 183:6, 234:9				
payment [2] - 197:13, 197:19				
pdf [1] - 27:2				
PEARL [1] - 3:6				
pejorative [2] - 97:10, 195:16				
pending [2] - 167:18, 233:2				
Pensacola [1] - 2:14				
people [17] - 52:14, 107:12, 129:5, 130:18, 133:17, 135:3, 143:5, 147:7, 151:12, 157:16,				

Philadelphia [2] - 6:6, 6:13 phone [1] - 235:8 phonetic [1] - 171:17 phrase [2] - 87:4, 212:21 physical [6] - 37:15, 64:13, 156:5, 174:14, 174:18, 201:19 physician's [1] - 204:17 pick [4] - 7:19, 71:25, 197:14, 201:4 pick-up [1] - 197:14 picked [7] - 18:11, 18:14, 18:15, 77:7, 78:8, 78:9, 80:9 picking [2] - 97:13, 197:22 picture [1] - 101:9 pie [4] - 61:4, 62:12, 150:11, 151:6 piece [2] - 95:1, 95:24 PIFKO [1] - 3:16 pileup [1] - 127:21 pill [1] - 153:23 pills [55] - 69:10, 72:21, 72:24, 78:20, 91:17, 92:5, 92:6, 92:7, 93:12, 94:2, 96:7, 114:10, 115:15, 115:19, 115:20, 116:24, 117:3, 117:7, 129:19, 130:4, 130:8, 130:12, 130:21, 131:4, 131:5, 151:7, 153:22, 154:16, 154:17, 154:20, 155:4, 155:5, 155:9, 158:18, 160:18, 160:23, 161:5, 162:17, 163:6, 175:3, 177:18, 179:8, 183:25, 185:1, 201:19, 203:23, 204:3, 204:7, 206:8, 206:14, 207:5, 208:7, 209:4 pin [3] - 87:4, 152:5, 222:6 pipeline [1] - 161:3 place [13] - 82:7, 153:10, 177:19, 186:13, 213:10, 219:16, 222:4, 234:15, 235:18,	235:25, 236:2, 237:3, 237:15 placed [2] - 65:21, 96:10 places [4] - 68:6, 201:3, 207:5, 209:6 placing [2] - 60:16, 220:15 PLAINTIFF [1] - 127:18 plaintiff [1] - 89:16 Plaintiff [5] - 1:5, 1:11, 2:2, 3:2, 4:1 Plaintiffs [1] - 238:6 plaintiffs [20] - 43:15, 56:24, 57:23, 58:8, 58:21, 58:25, 59:16, 60:17, 74:4, 76:23, 87:11, 88:25, 90:24, 93:8, 93:15, 93:22, 95:8, 126:9, 127:6, 173:13 Plaintiffs' [9] - 47:10, 47:21, 51:15, 61:3, 68:11, 68:16, 70:16, 70:18, 76:13 plaintiffs' [5] - 28:14, 80:10, 80:14, 89:5, 110:11 plan [1] - 85:19 play [2] - 145:9, 166:24 playbill [1] - 135:4 played [2] - 164:22, 166:25 playing [4] - 58:15, 88:18, 88:22, 88:23 Pleasant [3] - 3:15, 4:4, 4:9 Pleasure [1] - 8:4 pleasure [1] - 126:3 pledges [1] - 177:8 plenty [1] - 76:23 plug [2] - 97:15, 97:18 pluribus [1] - 151:4 plus [3] - 115:25, 122:3 Plus [10] - 26:9, 26:11, 26:15, 26:17, 26:21, 27:3, 27:6, 27:10, 27:17, 27:22 pockets [1] - 169:10 podium [2] - 83:10, 120:18 Point [2] - 92:16 point [40] - 16:14, 18:17, 31:25, 69:10, 70:7, 76:23, 77:2, 78:10, 79:4, 79:23, 81:13, 81:15, 83:17,	83:24, 87:15, 88:10, 88:12, 90:14, 90:15, 96:2, 96:25, 105:9, 113:22, 129:7, 130:11, 133:2, 136:22, 138:16, 139:10, 147:11, 166:7, 190:24, 198:6, 202:6, 206:11, 209:9, 213:1, 217:1, 220:15, 223:1, 226:1, 229:1, 232:1, 235:1, 238:1, 241:1, 244:1, 247:1, 250:1, 253:1, 256:1, 259:1, 262:1, 265:1, 268:1, 271:1, 274:1, 277:1, 280:1, 283:1, 286:1, 289:1, 292:1, 295:1, 298:1, 301:1, 304:1, 307:1, 310:1, 313:1, 316:1, 319:1, 322:1, 325:1, 328:1, 331:1, 334:1, 337:1, 340:1, 343:1, 346:1, 349:1, 352:1, 355:1, 358:1, 361:1, 364:1, 367:1, 370:1, 373:1, 376:1, 379:1, 382:1, 385:1, 388:1, 391:1, 394:1, 397:1, 400:1, 403:1, 406:1, 409:1, 412:1, 415:1, 418:1, 421:1, 424:1, 427:1, 430:1, 433:1, 436:1, 439:1, 442:1, 445:1, 448:1, 451:1, 454:1, 457:1, 460:1, 463:1, 466:1, 469:1, 472:1, 475:1, 478:1, 481:1, 484:1, 487:1, 490:1, 493:1, 496:1, 499:1, 502:1, 505:1, 508:1, 511:1, 514:1, 517:1, 520:1, 523:1, 526:1, 529:1, 532:1, 535:1, 538:1, 541:1, 544:1, 547:1, 550:1, 553:1, 556:1, 559:1, 562:1, 565:1, 568:1, 571:1, 574:1, 577:1, 580:1, 583:1, 586:1, 589:1, 592:1, 595:1, 598:1, 601:1, 604:1, 607:1, 610:1, 613:1, 616:1, 619:1, 622:1, 625:1, 628:1, 631:1, 634:1, 637:1, 640:1, 643:1, 646:1, 649:1, 652:1, 655:1, 658:1, 661:1, 664:1, 667:1, 670:1, 673:1, 676:1, 679:1, 682:1, 685:1, 688:1, 691:1, 694:1, 697:1, 700:1, 703:1, 706:1, 709:1, 712:1, 715:1, 718:1, 721:1, 724:1, 727:1, 730:1, 733:1, 736:1, 739:1, 742:1, 745:1, 748:1, 751:1, 754:1, 757:1, 760:1, 763:1, 766:1, 769:1, 772:1, 775:1, 778:1, 781:1, 784:1, 787:1, 790:1, 793:1, 796:1, 799:1, 802:1, 805:1, 808:1, 811:1, 814:1, 817:1, 820:1, 823:1, 826:1, 829:1, 832:1, 835:1, 838:1, 841:1, 844:1, 847:1, 850:1, 853:1, 856:1, 859:1, 862:1, 865:1, 868:1, 871:1, 874:1, 877:1, 880:1, 883:1, 886:1, 889:1, 892:1, 895:1, 898:1, 901:1, 904:1, 907:1, 910:1, 913:1, 916:1, 919:1, 922:1, 925:1, 928:1, 931:1, 934:1, 937:1, 940:1, 943:1, 946:1, 949:1, 952:1, 955:1, 958:1, 961:1, 964:1, 967:1, 970:1, 973:1, 976:1, 979:1, 982:1, 985:1, 988:1, 991:1, 994:1, 997:1, 1000:1, 1003:1, 1006:1, 1009:1, 1012:1, 1015:1, 1018:1, 1021:1, 1024:1, 1027:1, 1030:1, 1033:1, 1036:1, 1039:1, 1042:1, 1045:1, 1048:1, 1051:1, 1054:1, 1057:1, 1060:1, 1063:1, 1066:1, 1069:1, 1072:1, 1075:1, 1078:1, 1081:1, 1084:1, 1087:1, 1090:1, 1093:1, 1096:1, 1099:1, 1102:1, 1105:1, 1108:1, 1111:1, 1114:1, 1117:1, 1120:1, 1123:1, 1126:1, 1129:1, 1132:1, 1135:1, 1138:1, 1141:1, 1144:1, 1147:1, 1150:1, 1153:1, 1156:1, 1159:1, 1162:1, 1165:1, 1168:1, 1171:1, 1174:1, 1177:1, 1180:1, 1183:1, 1186:1, 1189:1, 1192:1, 1195:1, 1198:1, 1201:1, 1204:1, 1207:1, 1210:1, 1213:1, 1216:1, 1219:1, 1222:1, 1225:1, 1228:1, 1231:1, 1234:1, 1237:1, 1240:1, 1243:1, 1246:1, 1249:1, 1252:1, 1255:1, 1258:1, 1261:1, 1264:1, 1267:1, 1270:1, 1273:1, 1276:1, 1279:1, 1282:1, 1285:1, 1288:1, 1291:1, 1294:1, 1297:1, 1300:1, 1303:1, 1306:1, 1309:1, 1312:1, 1315:1, 1318:1, 1321:1, 1324:1, 1327:1, 1330:1, 1333:1, 1336:1, 1339:1, 1342:1, 1345:1, 1348:1, 1351:1, 1354:1, 1357:1, 1360:1, 1363:1, 1366:1, 1369:1, 1372:1, 1375:1, 1378:1, 1381:1, 1384:1, 1387:1, 1390:1, 1393:1, 1396:1, 1399:1, 1402:1, 1405:1, 1408:1, 1411:1, 1414:1, 1417:1, 1420:1, 1423:1, 1426:1, 1429:1, 1432:1, 1435:1, 1438:1, 1441:1, 1444:1, 1447:1, 1450:1, 1453:1, 1456:1, 1459:1, 1462:1, 1465:1, 1468:1, 1471:1, 1474:1, 1477:1, 1480:1, 1483:1, 1486:1, 1489:1, 1492:1, 1495:1, 1498:1, 1501:1, 1504:1, 1507:1, 1510:1, 1513:1, 1516:1, 1519:1, 1522:1, 1525:1, 1528:1, 1531:1, 1534:1, 1537:1, 1540:1, 1543:1, 1546:1, 1549:1, 1552:1, 1555:1, 1558:1, 1561:1, 1564:1, 1567:1, 1570:1, 1573:1, 1576:1, 1579:1, 1582:1, 1585:1, 1588:1, 1591:1, 1594:1, 1597:1, 1600:1, 1603:1, 1606:1, 1609:1, 1612:1, 1615:1, 1618:1, 1621:1, 1624:1, 1627:1, 1630:1, 1633:1, 1636:1, 1639:1, 1642:1, 1645:1, 1648:1, 1651:1, 1654:1, 1657:1, 1660:1, 1663:1, 1666:1, 1669:1, 1672:1, 1675:1, 1678:1, 1681:1, 1684:1, 1687:1, 1690:1, 1693:1, 1696:1, 1699:1, 1702:1, 1705:1, 1708:1, 1711:1, 1714:1, 1717:1, 1720:1, 1723:1, 1726:1, 1729:1, 1732:1, 1735:1, 1738:1, 1741:1, 1744:1, 1747:1, 1750:1, 1753:1, 1756:1, 1759:1, 1762:1, 1765:1, 1768:1, 1771:1, 1774:1, 1777:1, 1780:1, 1783:1, 1786:1, 1789:1, 1792:1, 1795:1, 1798:1, 1801:1, 1804:1, 1807:1, 1810:1, 1813:1, 1816:1, 1819:1, 1822:1, 1825:1, 1828:1, 1831:1, 1834:1, 1837:1, 1840:1, 1843:1, 1846:1, 1849:1, 1852:1, 1855
--	---	---

<p>113:13, 169:15, 189:6, 189:7, 193:23, 215:1, 215:8, 215:12 problematic [1] - 193:5 problems [6] - 56:8, 114:16, 114:17, 114:18, 189:4, 189:5 procedures [10] - 142:22, 147:8, 177:8, 177:9, 185:19, 185:21, 185:24, 185:25, 186:4, 186:22 proceed [4] - 7:9, 7:12, 98:6, 126:9 proceeding [1] - 73:15 proceedings [1] - 238:5 Proceedings [1] - 6:19 PROCEEDINGS [1] - 7:1 process [14] - 39:12, 39:24, 88:4, 113:17, 178:23, 187:1, 187:2, 187:3, 187:16, 221:20, 221:21, 223:8, 235:10, 236:22 processed [2] - 76:2, 124:13 processes [4] - 137:10, 152:25, 153:10, 177:9 processing [8] - 66:11, 112:24, 113:1, 113:8, 113:17, 113:21, 113:25, 137:12 Proctor [1] - 2:12 procured [1] - 101:19 produce [2] - 60:23, 99:5 produced [25] - 6:19, 33:21, 39:12, 39:13, 40:2, 44:1, 44:3, 45:3, 57:18, 57:21, 57:24, 58:21, 59:7, 59:8, 59:17, 59:24, 60:6, 60:11, 61:24, 96:25, 97:2, 98:12, 109:17, 123:22, 132:15 product [16] - 80:15, 111:18, 136:13, 153:6, 153:7, 162:13, 163:2, 172:12, 177:21,</p>	<p>178:21, 190:8, 202:13, 218:12, 218:13, 225:16, 236:9 production [5] - 42:12, 45:5, 47:2, 60:7, 109:20 products [12] - 34:24, 35:2, 37:11, 37:16, 37:17, 131:19, 152:1, 152:3, 154:1, 154:21, 197:12, 201:22 program [23] - 99:17, 137:13, 137:14, 187:17, 187:18, 188:5, 188:13, 188:15, 188:20, 188:21, 189:7, 192:1, 192:5, 219:10, 219:14, 219:16, 224:25, 225:1, 228:2, 228:8, 228:13, 233:9, 237:3 Program [10] - 137:7, 145:20, 145:23, 145:24, 146:6, 147:3, 147:13, 147:17, 187:10, 189:16 programmed [3] - 99:8, 99:14 projects [1] - 145:2 promise [7] - 98:25, 146:9, 152:5, 228:1, 234:11, 235:2, 235:20 promised [2] - 233:6, 234:7 promises [3] - 177:7, 177:15, 229:10 promulgate [1] - 158:10 prong [1] - 102:4 pronounce [2] - 140:3, 230:2 properly [1] - 216:22 proportion [1] - 51:20 prosecuting [1] - 230:15 prospective [1] - 216:24 protect [3] - 153:10, 225:13, 236:7 provide [10] - 24:9, 56:15, 63:3, 71:9, 162:2, 218:24, 221:9, 221:13, 231:15 provided [10] - 37:23,</p>	<p>41:22, 42:4, 52:23, 62:23, 69:4, 74:20, 75:9, 81:8, 81:9 providing [1] - 216:1 proximity [1] - 204:16 Ps [1] - 115:25 Pseudoephedrine [1] - 169:9 pseudoephedrine [1] - 169:11 psychological [1] - 156:5 public [3] - 50:11, 173:20 publicly [7] - 46:16, 49:21, 50:6, 50:13, 51:3, 76:8, 76:9 publish [1] - 68:10 published [1] - 46:17 publishes [1] - 45:1 pull [16] - 26:7, 31:6, 40:9, 41:3, 46:17, 47:10, 47:21, 48:11, 49:8, 51:15, 53:2, 92:13, 96:18, 97:15, 97:18, 164:21 pulled [2] - 79:14, 134:16 pulling [2] - 71:8, 191:19 purchase [2] - 115:2, 115:5 purchased [3] - 158:23, 162:1, 197:13 purchases [3] - 42:15, 158:21, 172:18 purchasing [1] - 206:23 purported [2] - 83:22, 88:24 purpose [18] - 56:14, 77:1, 77:3, 99:25, 151:2, 156:17, 156:24, 157:15, 158:13, 179:20, 180:14, 181:23, 182:11, 184:10, 200:21, 210:25, 214:22 purposes [6] - 46:14, 116:15, 150:7, 154:5, 212:9, 216:25 pursuant [3] - 45:17, 45:20, 235:10 put [38] - 8:6, 9:3, 22:22, 36:6, 45:2, 70:15, 76:2, 77:13, 77:21, 78:24, 78:25, 79:10, 79:17, 79:20, 79:23</p>	<p>83:1, 85:2, 87:4, 91:25, 92:20, 94:13, 116:15, 126:15, 126:24, 134:7, 152:5, 170:21, 180:9, 186:13, 187:25, 194:18, 195:4, 208:21, 209:16, 210:11, 210:15, 222:6, 235:25, 236:1 Putnam [1] - 208:15 putting [4] - 49:8, 210:2, 219:8, 235:18 pyramid [1] - 133:17</p>	<p>R RA [1] - 148:11 Rafferty [1] - 2:12 rage [1] - 169:5 raise [2] - 127:17, 178:5 raised [1] - 121:16 raising [1] - 205:10 Raleigh [1] - 208:16 ran [1] - 59:21 ranch [1] - 84:17 randomly [1] - 56:6 range [2] - 121:22, 197:12 ranking [2] - 28:5, 68:24 Rannazzisi [11] - 171:16, 212:20, 212:23, 212:24, 212:25, 213:2, 220:2, 222:12, 224:22, 231:20, 236:17 Rather [1] - 15:20 rather [2] - 59:10, 126:14 ratio [1] - 172:8 raw [3] - 76:2, 91:23, 113:20 re [2] - 58:15, 148:22 re-playing [1] - 58:15 re-visit [1] - 148:22 read [53] - 8:21, 81:1, 96:18, 97:6, 100:25, 101:15, 101:25, 102:8, 132:11, 155:14, 156:2, 156:12, 157:6, 157:7, 157:12, 157:19, 168:6, 168:11, 168:15, 171:1, 171:6, 171:10, 171:15, 171:21, 184:10, 197:8, 197:10, 198:5, 199:13, 202:5, 202:19, 202:22, 205:7, 212:4, 213:14, 213:15, 214:6, 214:18, 215:5, 215:22, 215:23</p>
--	---	---	---	---

216:12, 216:16, 217:24, 218:18, 223:5, 226:4, 231:16, 232:8, 232:14, 233:4, 237:10 reading [7] - 81:18, 135:23, 155:24, 156:12, 205:4, 208:21 ready [6] - 84:19, 127:4, 190:13, 211:20, 226:9, 228:23 real [3] - 35:14, 146:8, 203:19 real-time [1] - 35:14 really [16] - 24:2, 45:7, 45:22, 53:14, 108:17, 110:9, 111:9, 113:16, 115:10, 117:10, 122:4, 123:16, 124:6, 124:23, 134:25, 216:14 reason [16] - 18:15, 38:24, 50:16, 50:17, 52:12, 88:23, 92:2, 110:4, 123:21, 134:25, 143:23, 167:20, 178:4, 180:9, 195:21, 201:24 reasonable [1] - 216:4 reasons [2] - 117:8, 120:8 recalling [1] - 46:6 receipt [1] - 107:19 receive [5] - 27:11, 126:8, 161:25, 162:5, 177:22 received [6] - 26:4, 27:6, 44:12, 59:8, 212:18, 225:17 receiving [1] - 107:16 recently [1] - 100:10 recess [1] - 171:25 Recess [3] - 35:20, 98:1, 172:1 recessed [1] - 237:19 recognize [13] - 19:24, 20:1, 132:16, 132:22, 133:5, 133:7, 136:3, 136:18, 150:15, 182:3, 212:6, 214:8, 222:22 recognized [1] - 30:23 recollection [1] - 194:7	recommendations [1] - 202:14 record [18] - 79:1, 81:19, 92:24, 94:14, 96:5, 96:8, 96:18, 102:9, 126:16, 128:3, 129:18, 132:14, 152:18, 157:6, 223:14, 229:14, 238:5 recorded [1] - 6:19 Recording [2] - 164:22, 166:25 recordkeeping [2] - 161:2, 161:16 records [3] - 113:15, 128:13, 181:4 recross [3] - 106:9, 106:14, 106:17 red [2] - 33:16, 36:24 redirect [2] - 66:3, 76:25 REDIRECT [1] - 66:8 reduces [1] - 104:14 Reed [3] - 6:4, 6:11, 229:1 refer [2] - 36:6, 159:7 reference [8] - 59:3, 82:10, 129:7, 172:21, 191:21, 207:1, 214:11, 233:20 referenced [4] - 150:9, 159:8, 196:4, 207:16 references [1] - 89:8 referencing [5] - 164:3, 173:13, 200:12, 204:24, 228:16 referred [4] - 54:21, 66:17, 118:12, 212:20 referring [12] - 26:2, 44:23, 71:3, 100:2, 155:11, 165:23, 172:10, 174:9, 183:17, 185:24, 186:6, 208:9 reflect [18] - 17:5, 18:17, 18:20, 23:23, 32:20, 49:16, 50:1, 50:21, 59:25, 93:22, 99:18, 109:5, 109:6, 109:19, 113:24, 115:25, 117:6, 120:12 reflected [7] - 28:13, 39:3, 47:12, 47:23, 48:13, 53:6, 62:21 reflecting [7] - 33:16,	42:11, 57:25, 58:22, 59:18, 60:24, 62:12 reflective [1] - 33:4 reflects [6] - 9:13, 27:3, 29:23, 35:9, 53:5, 120:11 regard [1] - 189:22 regarding [15] - 24:14, 36:7, 41:23, 42:5, 53:5, 54:19, 57:25, 58:9, 58:23, 60:19, 81:6, 81:8, 168:12, 228:12, 229:9 Region [4] - 140:7, 140:20, 140:23, 143:4 region [4] - 16:17, 140:10, 140:18, 206:3 regional [2] - 62:16, 140:16 Regional [2] - 140:6, 143:3 regions [1] - 140:10 registered [2] - 65:16, 214:20 registrant [7] - 162:18, 190:14, 213:18, 219:20, 220:15, 221:10 registrants [6] - 109:23, 109:24, 112:15, 182:15, 212:3, 212:12 registration [33] - 63:4, 63:22, 64:22, 107:19, 152:11, 152:12, 153:8, 161:11, 161:18, 161:19, 161:20, 161:22, 161:23, 162:4, 162:21, 179:23, 184:3, 191:9, 191:13, 198:11, 202:1, 202:2, 203:5, 216:3, 216:4, 216:5, 217:4, 218:9, 219:1, 220:24, 221:16, 223:2 registrations [2] - 198:5, 217:6 regulate [1] - 221:19 regulated [1] - 154:17 regulates [1] - 44:16 regulation [5] - 184:8, 201:8, 221:18, 237:6 Regulations [12] - 142:23, 146:5, 146:17, 147:2,	155:13, 158:9, 162:7, 178:12, 180:10, 233:16, 236:15, 237:9 regulations [6] - 155:12, 168:22, 181:24, 182:12, 221:11, 221:20 regulator [1] - 65:16 regulators [1] - 67:4 Regulatory [12] - 91:15, 128:9, 128:14, 128:25, 129:6, 129:9, 130:3, 145:21, 148:10, 194:4, 230:19, 231:13 regulatory [10] - 142:1, 148:16, 148:18, 165:1, 181:7, 181:8, 189:24, 201:18, 222:4, 231:23 reinstated [2] - 176:18, 176:20 reiterate [1] - 214:24 relate [2] - 113:8, 121:6 related [3] - 60:15, 164:6, 212:8 relating [3] - 37:15, 67:8, 185:25 relation [2] - 66:23, 69:19 relationship [3] - 169:3, 230:24, 231:5 relative [1] - 116:9 relatively [2] - 32:17, 99:4 relaxed [1] - 89:20 Release [1] - 226:5 release [8] - 193:21, 193:22, 227:10, 227:15, 227:21, 235:6, 235:11 released [3] - 193:24, 232:17, 235:15 releasing [1] - 180:25 relevance [1] - 189:11 relevancy [4] - 88:25, 93:21, 94:9, 94:16 reliability [2] - 94:5, 94:7 reliable [1] - 39:9 reliably [1] - 39:3 relieve [2] - 202:7, 202:20 rely [3] - 220:14, 220:23, 222:1 remained [1] - 148:24	remaining [3] - 61:19, 234:14, 234:24 remand [1] - 101:22 remarks [1] - 160:6 remember [5] - 79:9, 94:23, 146:22, 165:25, 196:2 remove [2] - 163:5, 196:6 removed [1] - 94:12 removes [1] - 209:19 renew [1] - 209:18 Reno [3] - 170:11, 170:13, 170:15 repeat [3] - 27:20, 58:18, 118:10 rephrase [3] - 17:12, 25:23, 128:22 rephrasing [1] - 75:15 report [46] - 27:2, 38:23, 39:25, 40:25, 43:7, 46:16, 76:18, 91:10, 99:8, 100:10, 100:16, 104:4, 109:25, 121:20, 122:17, 133:25, 139:9, 139:11, 139:13, 139:15, 139:17, 139:20, 139:22, 145:3, 163:13, 177:1, 179:2, 179:4, 180:2, 180:15, 180:16, 180:24, 181:1, 181:8, 186:24, 200:1, 200:15, 201:8, 201:12, 201:16, 202:12, 219:12, 232:21, 237:7 Report [4] - 76:14, 170:11, 170:15, 199:21 reportable [1] - 227:12 reported [20] - 25:4, 25:22, 40:25, 41:5, 107:1, 107:22, 107:23, 108:13, 109:5, 110:1, 112:15, 139:4, 147:11, 180:5, 195:14, 200:18, 224:8, 232:17, 238:9 Reporter [6] - 6:17, 6:18, 238:3, 238:12 reporter [4] - 35:12, 146:11, 171:23, 220:21 REPORTER [7] - 118:10, 118:14,
--	--	--	---	---

137:20, 146:19, 152:2, 157:22, 203:8 Reporting [1] - 202:7 reporting [21] - 108:1, 108:4, 108:7, 108:15, 108:25, 109:24, 133:20, 133:21, 152:25, 153:2, 153:3, 176:22, 176:24, 179:21, 187:1, 200:22, 202:19, 218:19, 219:10, 222:5 Reports [10] - 47:13, 47:24, 48:13, 49:22, 50:1, 50:6, 51:3, 122:23, 124:2, 169:9 represent [6] - 23:19, 132:13, 132:14, 150:13, 182:19, 193:3 representing [1] - 164:10 represents [3] - 47:11, 47:22, 48:12 request [4] - 58:8, 60:18, 71:22, 85:21 requested [6] - 57:23, 58:21, 58:25, 59:4, 59:16, 72:4 require [1] - 126:12 required [5] - 45:10, 92:8, 153:1, 162:12, 177:1 requirement [7] - 153:4, 167:3, 181:8, 220:9, 220:12, 236:23, 237:9 requirements [28] - 37:15, 45:13, 145:23, 147:3, 147:6, 148:6, 148:18, 152:18, 152:19, 152:20, 152:21, 153:10, 153:25, 161:2, 161:16, 179:24, 183:11, 184:9, 188:22, 189:3, 191:10, 202:3,	202:21, 219:3, 221:21, 222:4, 231:23 requires [1] - 162:11 requiring [1] - 221:24 rescheduled [2] - 37:20, 154:14 rescheduling [3] - 34:20, 34:25, 37:7 research [1] - 10:3 reserve [1] - 12:7 residents [5] - 52:5, 67:24, 68:6, 68:18, 69:8 resolution [2] - 170:3, 223:11 resolve [3] - 169:24, 169:25, 231:2 resolved [1] - 90:7 respect [3] - 32:10, 126:21, 227:12 respectfully [1] - 92:23 respond [4] - 69:23, 80:22, 83:8, 93:5 responded [1] - 98:9 response [1] - 98:24 responses [1] - 168:11 responsibilities [6] - 67:13, 146:18, 147:14, 147:16, 214:24, 236:12 responsibility [18] - 8:14, 146:5, 152:4, 160:22, 162:5, 162:17, 162:20, 185:22, 191:5, 201:6, 201:12, 201:18, 202:8, 217:2, 217:6, 217:7, 217:14, 218:20 responsible [11] - 136:1, 138:24, 143:8, 143:10, 146:17, 151:24, 152:9, 152:16, 161:15, 191:12, 201:22 rest [3] - 105:9, 105:19, 232:18 restrictions [3] - 155:9, 155:11, 155:22 result [2] - 95:16, 184:15 results [1] - 185:2 resume [1] - 172:3 retail [16] - 15:6, 94:11, 103:2, 103:5,	103:6, 103:16, 103:17, 103:25, 104:7, 104:11, 104:23, 105:10, 105:11, 105:12, 105:25, 172:17 Retail [9] - 47:12, 47:23, 48:13, 49:21, 50:1, 50:5, 51:3, 122:22, 124:1 return [5] - 7:22, 115:10, 115:14, 116:1, 117:3 returned [3] - 93:13, 114:10, 116:24 returns [4] - 115:4, 120:4, 120:6, 120:14 reveal [1] - 88:10 revealed [1] - 28:21 reversal [1] - 102:1 reverse [16] - 101:22, 107:12, 107:13, 107:15, 107:18, 107:20, 107:23, 108:1, 108:9, 108:12, 108:14, 108:15, 108:18, 108:25, 109:5, 113:13 reversing [1] - 126:8 review [8] - 60:4, 66:16, 67:6, 83:3, 179:3, 180:23, 232:10, 232:17 reviewed [6] - 29:21, 38:18, 41:24, 42:6, 52:6, 60:15 reviewing [3] - 60:14, 103:14, 187:6 revising [1] - 126:8 revocation [1] - 218:25 revoke [4] - 161:19, 181:11, 201:11, 217:8 Reynolds [1] - 20:17 Rice [5] - 2:9, 3:14, 4:3, 4:5, 4:8 rid [2] - 113:13, 113:14 right-hand [2] - 197:4, 214:2 ring [1] - 8:20 ripe [1] - 126:19 ripple [1] - 89:14 rise [1] - 29:7 rising [1] - 9:24 risks [2] - 175:3, 175:11 Rite [7] - 12:22, 15:25,	19:13, 72:15, 72:21, 73:9, 80:25 Rite-Aid [3] - 12:22, 15:25, 19:13 RMR [2] - 6:17, 6:18 road [1] - 131:13 ROBERT [1] - 6:11 Robert [3] - 136:23, 136:24, 139:8 ROBERTSON [1] - 3:6 roid [1] - 169:5 role [7] - 128:7, 128:14, 129:15, 135:13, 137:6, 137:7, 167:11 roles [1] - 145:8 roll [2] - 143:7, 234:17 room [1] - 80:3 rose [1] - 9:23 Ross [4] - 133:24, 138:21, 139:13 rough [2] - 23:1, 148:25 roughly [11] - 15:6, 15:12, 15:13, 15:21, 16:11, 18:2, 22:21, 30:11, 43:7, 43:10, 49:17 round [1] - 210:15 rounding [1] - 116:8 route [1] - 86:20 routinely [1] - 121:12 row [2] - 16:18, 102:25 RPR [1] - 6:18 RPR-RMR-CRR- FCRR [1] - 6:18 rub [2] - 124:18, 124:23 RUBY [1] - 4:17 Ruby [1] - 4:17 rude [1] - 146:9 Rule [2] - 125:4, 126:7 rule [2] - 92:1, 94:23 ruled [2] - 11:5, 90:11 rules [2] - 87:16, 158:10 ruling [5] - 87:2, 87:14, 87:21, 87:22, 126:8 run [2] - 99:5, 99:7	S S-O-M-S [1] - 186:16 s\Ayme [1] - 238:11 s\Lisa [1] - 238:11 safe [2] - 18:10, 142:17 safeguard [1] - 162:6 safely [1] - 163:6
---	--	--	--	--

11:9, 11:10, 68:21, 71:8, 77:5, 77:16, 80:1, 80:20, 82:12, 98:25, 99:10, 103:9, 117:22	see [95] - 8:8, 8:9, 8:10, 8:23, 9:2, 9:9, 9:15, 10:6, 10:9, 10:14, 10:20, 12:17, 12:18, 12:20, 14:25, 17:23, 18:22, 18:24, 18:25, 19:13, 21:10, 21:14, 21:24, 22:4, 37:21, 41:16, 49:5, 49:10, 49:14, 61:16, 68:23, 69:12, 73:1, 77:12, 77:13, 78:2, 85:17, 87:7, 92:3, 93:17, 95:23, 97:19, 107:19, 107:21, 107:23, 107:24, 107:25, 108:15, 108:24, 112:5, 114:24, 115:1, 115:4, 115:6, 118:4, 119:23, 132:11, 135:4, 135:5, 138:20, 139:7, 143:18, 147:7, 147:15, 147:22, 150:14, 156:21, 157:11, 169:10, 179:3, 180:13, 181:3, 186:3, 186:23, 189:7, 189:12, 197:4, 198:16, 198:18, 199:20, 199:22, 205:7, 208:18, 214:2, 214:12, 215:3, 215:14, 218:4, 218:16, 221:15, 230:18, 236:21, 237:9, 237:18	self-distributed [1] - 36:16 self-distributing [4] - 35:5, 37:21, 114:21 self-distributor [1] - 38:16 sell [12] - 153:5, 155:7, 159:13, 160:10, 160:11, 177:18, 177:20, 193:1, 204:13, 217:5, 225:6 seller [2] - 27:18, 27:23 sellers [1] - 28:11 selling [9] - 155:4, 169:22, 175:3, 175:11, 183:24, 203:12, 203:17, 220:23, 221:9 sells [1] - 158:17 send [3] - 204:22, 220:4, 220:6 senior [3] - 147:7, 170:8, 230:11 SENIOR [1] - 1:17 Senior [10] - 7:2, 91:14, 128:8, 129:8, 129:12, 129:18, 135:23, 138:22, 144:4, 145:21 Sensabaugh [1] - 5:14 sent [8] - 72:15, 120:5, 213:9, 213:17, 213:18, 214:19, 236:18 sentence [11] - 41:7, 101:13, 101:16, 102:1, 214:18, 215:5, 215:24, 216:14, 217:13, 220:11, 220:22 sentences [1] - 101:16 separate [9] - 75:14, 93:17, 117:14, 129:15, 129:16, 141:24, 145:25, 161:17, 166:4 September [3] - 211:19, 211:22, 214:1 sequence [1] - 58:13 series [9] - 9:2, 59:10, 68:17, 70:20, 71:12, 85:2, 122:10, 123:2, 211:12 serious [2] - 215:8, 215:11 serve [2] - 207:3, 225:21 served [4] - 164:7,	170:4, 223:3, 223:4 service [1] - 223:8 serviced [4] - 28:22, 29:8, 57:4, 207:6 services [1] - 208:5 servicing [1] - 116:23 set [11] - 10:4, 18:4, 24:7, 36:3, 45:11, 70:22, 77:1, 99:1, 118:4, 124:14, 235:21 sets [4] - 9:19, 10:2, 45:4, 229:21 setting [3] - 10:2, 45:13, 204:7 settlement [6] - 190:15, 225:23, 226:11, 226:14, 228:12, 229:10 Settlement [1] - 226:4 seven [5] - 69:12, 104:4, 119:19, 138:19, 141:2 several [14] - 16:22, 17:14, 17:17, 17:20, 47:5, 53:11, 99:7, 103:9, 140:10, 141:18, 150:9, 170:19, 204:21, 207:8 severe [3] - 155:9, 155:22, 156:5 shall [2] - 187:8, 228:4 SHANNON [1] - 6:3 share [3] - 23:24, 98:11, 159:9 shares [2] - 24:2, 115:13 shelf [1] - 161:9 shelves [1] - 93:13 shift [5] - 32:3, 32:12, 38:8, 235:19, 235:20 ship [18] - 45:15, 45:19, 45:22, 63:25, 64:25, 149:24, 163:16, 165:7, 165:8, 165:9, 181:12, 200:7, 200:18, 200:23, 201:9, 219:23, 233:10, 236:14 shipment [14] - 32:4, 38:9, 64:10, 64:15, 65:14, 65:20, 65:22, 72:20, 110:2, 113:14, 114:13, 163:9, 166:12, 166:20 shipments [73] - 15:3, 15:4, 15:7, 15:9,	25:20, 26:4, 27:3, 27:7, 27:11, 28:2, 29:6, 29:11, 29:17, 31:9, 31:20, 32:13, 32:16, 32:21, 34:9, 38:1, 38:5, 38:13, 39:7, 40:7, 42:10, 42:11, 44:10, 47:11, 47:22, 48:12, 50:13, 55:6, 55:14, 63:17, 64:6, 64:7, 65:19, 67:9, 72:15, 82:14, 94:10, 94:12, 98:19, 98:20, 103:19, 108:23, 109:5, 112:4, 112:7, 112:10, 113:12, 113:18, 113:20, 113:24, 114:14, 114:25, 115:17, 116:2, 116:7, 116:10, 119:18, 120:2, 120:11, 120:12, 122:21, 123:23, 123:24, 165:10, 165:22, 178:2, 206:24, 233:13 shipped [38] - 24:15, 25:1, 25:9, 25:14, 26:11, 26:15, 28:18, 33:1, 36:15, 37:25, 38:15, 42:22, 43:20, 48:3, 48:18, 50:22, 55:1, 61:9, 61:14, 61:20, 61:24, 62:5, 62:15, 62:17, 65:20, 96:7, 107:14, 109:7, 110:24, 114:11, 115:7, 115:18, 119:24, 219:12, 227:22, 233:2, 234:25 shipping [6] - 37:2, 107:16, 167:2, 167:12, 178:21, 183:18 ships [1] - 185:2 short [1] - 83:2 shortened [1] - 129:8 shorthand [2] - 129:1, 129:4 shortly [1] - 175:18 show [27] - 19:23, 20:18, 21:2, 21:12, 24:6, 26:24, 28:17, 43:19, 46:14, 56:7, 64:7, 71:25, 78:5, 85:22, 86:1, 86:4, 90:24, 91:6, 97:3,
--	---	---	---	--

120:11, 156:13, 157:5, 161:8, 176:10, 190:22, 194:16, 223:1 showed [7] - 47:5, 47:16, 81:3, 81:6, 81:7, 82:13, 93:15 showing [12] - 7:23, 26:3, 30:24, 41:12, 46:10, 60:8, 64:10, 73:24, 93:7, 93:18, 93:24, 116:6 shown [11] - 36:16, 36:24, 78:18, 81:1, 93:11, 94:15, 94:24, 96:23, 97:8, 156:9, 167:5 shows [16] - 9:9, 10:14, 10:20, 31:8, 31:19, 36:10, 47:1, 48:2, 48:17, 61:8, 61:13, 61:18, 72:17, 93:18, 123:21, 123:23 shrinkage [1] - 136:12 shut [3] - 67:3, 225:15, 225:20 sic [3] - 60:10, 67:1, 202:8 sic [1] - 112:5 side [14] - 49:9, 101:14, 108:4, 108:5, 108:7, 113:2, 113:8, 138:15, 144:22, 150:14, 195:4, 231:4 side-by-side [1] - 49:9 sides [1] - 108:1 sign [4] - 30:23, 153:7, 201:25 signed [4] - 212:24, 219:14, 219:15, 235:5 significant [3] - 77:24, 112:6, 192:19 significantly [3] - 51:11, 100:3, 111:16 similar [11] - 30:11, 49:10, 49:13, 49:14, 55:10, 60:15, 71:5, 76:15, 105:4, 112:3, 153:9 similar-type [1] - 153:9 similarly [2] - 31:23, 109:9 simple [3] - 99:2, 99:4, 147:19 simply [8] - 69:9, 77:1, 79:4, 103:2, 150:10, 191:16, 208:21, 220:14 simultaneously [2] - 107:5, 107:23 SINGER [1] - 4:5 single [10] - 16:20, 64:15, 65:20, 71:21, 72:17, 79:6, 82:6, 180:4, 223:23 sit [3] - 87:12, 87:13, 99:12 site [1] - 163:3 sitting [2] - 80:2, 131:3 situation [1] - 210:17 six [7] - 34:4, 69:12, 104:4, 114:13, 116:1, 140:21, 141:2 size [5] - 67:15, 178:1, 197:12, 197:18 Size [1] - 178:2 skills [1] - 144:25 skip [1] - 184:25 slide [18] - 15:8, 17:22, 103:21, 105:17, 136:21, 143:17, 197:1, 197:23, 197:24, 198:4, 198:16, 198:23, 199:17, 199:18, 202:4, 202:23, 203:3 slides [2] - 105:23, 196:24 slightly [2] - 39:5, 104:2 slope [2] - 49:10, 49:18 slow [4] - 146:9, 146:21, 157:22, 203:10 Slow [1] - 203:8 small [2] - 37:3, 107:6 smart [2] - 82:22, 160:6 smart-aleck [1] - 160:6 Smith [3] - 6:4, 6:11, 229:1 snippet [1] - 165:4 software [1] - 99:4 sold [22] - 26:20, 91:17, 92:5, 92:6, 92:7, 129:19, 130:4, 130:8, 130:12, 130:22, 131:4, 131:19, 159:20, 160:1, 160:11, 161:5, 161:9, 172:12, 203:23, 223:1 sort [9] - 58:13, 85:18, 99:25, 100:3, 100:22, 110:24, 118:25, 122:20, 135:3 sorts [1] - 178:7 sound [2] - 55:2, 151:8 sounds [5] - 16:6, 41:1, 84:9, 85:19, 95:20 source [3] - 24:21, 62:1, 216:5 South [1] - 2:13 Southern [1] - 7:2 SOUTHERN [1] - 1:1 space [1] - 71:16 spawning [1] - 228:7 speaking [2] - 42:21, 164:11 Specialist [1] - 137:15 specialists [2] - 140:14	Specialty [1] - 138:22 specific [26] - 10:21, 35:9, 43:4, 53:6, 54:21, 59:23, 64:7, 64:10, 64:12, 66:19, 66:21, 67:2, 67:8, 71:9, 82:14, 86:10, 87:1, 126:23, 148:4, 173:7, 178:24, 179:15, 207:14 specifically [9] - 11:20, 52:2, 60:14, 67:10, 67:14, 68:5, 70:19, 100:1, 142:1 speculation [1] - 234:3 spent [4] - 15:24, 76:23, 77:5, 77:24 spike [1] - 93:9 spot [1] - 22:22 spreadsheet [3] - 92:14, 92:21, 123:6 spreadsheets [1] - 123:1 Square [2] - 6:5, 6:12 squarely [1] - 83:4 Stacy [1] - 171:17 staff [2] - 102:13, 151:18 Stafford [1] - 65:11 stamp [3] - 197:5, 214:3, 214:8 stamped [3] - 196:7, 196:9, 197:1 stand [7] - 79:25, 96:3, 96:4, 96:6, 105:7, 127:13, 172:3 standard [3] - 70:22, 72:15, 109:12 stands [1] - 137:12 STANNER [1] - 5:10 start [13] - 32:22, 33:24, 91:4, 135:8, 166:11, 174:23, 176:11, 183:9, 190:7, 196:22, 213:24, 214:17, 234:12 started [8] - 29:14, 29:18, 82:7, 102:17, 148:13, 169:2, 169:4, 188:21 Starting [1] - 215:23 starting [5] - 16:18, 31:16, 146:13, 218:16, 220:8 starts [1] - 111:25 State [13] - 19:4, 19:5, 19:9, 19:16, 19:23, 19:24, 20:2, 47:24,	48:4, 48:8, 48:24, 112:9, 173:3 state [16] - 9:10, 9:16, 10:23, 15:23, 18:18, 50:2, 50:3, 63:11, 65:16, 67:4, 76:4, 89:15, 100:15, 123:6, 128:2, 168:23 statement [7] - 28:4, 158:5, 159:25, 203:12, 203:15, 205:2, 216:7 STATES [2] - 1:1, 1:17 states [3] - 51:2, 51:7, 51:18 States [15] - 7:2, 47:14, 47:18, 48:9, 48:25, 49:4, 155:21, 172:25, 182:23, 198:17, 212:7, 214:20, 215:12, 218:7, 230:14 statewide [1] - 123:4 STATUS [1] - 1:17 Status [1] - 7:2 statute [1] - 158:8 statutory [3] - 218:20, 218:24, 219:3 steal [1] - 87:3 stenography [1] - 6:19 step [3] - 110:3, 132:8, 187:1 steps [5] - 39:17, 39:20, 39:23, 109:16, 216:4 steroids [1] - 169:4 Steve [12] - 133:25, 135:21, 139:15, 145:6, 145:8, 145:13, 145:21, 147:12, 147:14, 195:10, 195:23, 198:3 Steve's [1] - 147:5 STEVEN [1] - 4:17 stick [1] - 15:8 sticking [1] - 32:19 still [19] - 120:2, 120:11, 120:17, 135:16, 137:19, 145:6, 147:14, 159:12, 172:2, 174:12, 200:6, 200:18, 200:23, 224:23, 235:17, 236:4, 237:1, 237:4, 237:11 Still [1] - 137:20 stipulated [1] - 93:1 stipulation [1] - 89:4
---	--	---

stolen [1] - 142:15	155:16, 155:20, 172:8, 214:25	summarized [1] - 125:9	Suspicious [6] - 168:12, 178:15, 178:17, 180:8, 199:19, 199:21	35:13, 203:19
stop [7] - 32:23, 160:7, 169:22, 200:25, 237:7, 237:8, 237:15	Substance [1] - 67:14	summarizes [1] - 92:11	suspicious [78] - 136:15, 153:3, 163:9, 163:12, 163:15, 163:17, 166:4, 166:13, 167:12, 172:11, 176:22, 176:24, 177:1, 178:9, 178:10, 178:14, 178:17, 178:19, 179:4, 179:7, 179:8, 179:9, 179:17, 179:20, 179:25, 180:1, 180:3, 180:5, 180:8, 180:14, 180:16, 180:19, 180:22, 180:23, 181:8, 186:7, 186:8, 186:10, 186:24, 187:1, 191:24, 200:1, 200:15, 200:22, 200:24, 201:8, 201:10, 201:13, 201:16, 202:5, 202:7, 202:12, 202:18, 202:19, 204:3, 212:9, 213:6, 218:19, 218:21, 219:10, 219:12, 220:15, 220:16, 220:25, 222:5, 233:7, 233:13, 233:21, 234:8, 234:12, 236:13, 236:14, 236:16, 236:22, 237:7	switched [1] - 35:6 switches [3] - 31:24, 114:21, 114:22 SWORN [1] - 127:18 system [21] - 152:15, 155:2, 158:11, 158:13, 158:16, 163:4, 163:11, 181:2, 186:10, 186:13, 187:16, 189:7, 216:1, 216:22, 227:17, 232:13, 235:8, 235:15, 235:17, 235:25, 236:1 systemic [3] - 92:19, 187:15, 187:20
stopped [4] - 29:13, 34:23, 35:5, 37:21	substances [28] - 43:21, 43:22, 43:25, 44:17, 57:6, 57:19, 142:20, 148:23, 152:10, 154:7, 154:9, 154:24, 154:25, 157:10, 158:1, 172:13, 172:19, 198:8, 202:25, 203:11, 203:14, 214:21, 216:2, 216:25, 217:16, 227:13, 228:4	summary [12] - 80:11, 82:16, 94:22, 94:23, 97:11, 98:11, 104:9, 105:23, 106:24, 125:10, 202:23	Summit [1] - 100:9	T
stopping [1] - 234:15	super [1] - 193:8	supervise [3] - 133:18, 133:21, 151:13	super [1] - 193:8	tab [1] - 76:1
stores [1] - 37:22	supervision [3] - 56:11, 56:16, 135:19	supervision [3] - 56:11, 56:16, 135:19	supervision [3] - 56:11, 56:16, 135:19	table [5] - 24:12, 26:3, 26:24, 41:12, 73:24
story [3] - 97:2, 101:5, 150:24	supplementation [2] - 24:24, 124:19	supplemented [1] - 24:20	supplemented [1] - 24:20	tables [10] - 23:23, 26:3, 70:22, 98:18, 99:3, 112:8, 114:19, 116:6, 116:15, 120:8
Strait [1] - 171:19	supplied [2] - 22:5, 73:1	supplier [1] - 35:2	supplied [2] - 22:5, 73:1	tablets [1] - 169:11
streamline [1] - 18:5	substantially [1] - 17:9	suppliers [1] - 30:16	supplier [1] - 35:2	Targeting [1] - 8:13
Street [15] - 2:7, 2:10, 2:13, 3:5, 3:7, 3:10, 3:12, 4:6, 4:13, 4:15, 4:18, 5:5, 5:12, 6:6, 6:13	substantial [2] - 158:1, 217:16	supply [3] - 44:16, 236:7, 236:11	suppliers [1] - 30:16	technical [3] - 23:11, 231:14
strength [1] - 111:1	substantially [1] - 17:9	supported [1] - 102:3	supplies [1] - 30:16	technicality [1] - 183:16
strictly [1] - 186:4	substantial [2] - 158:1, 217:16	supporting [1] - 102:11	supplies [1] - 30:16	technicians [1] - 35:18
strike [1] - 174:23	substantially [1] - 17:9	supports [1] - 102:12	supplies [1] - 30:16	techniques [1] - 181:5
Strike [1] - 189:15	subtotaled [1] - 40:8	supposed [1] - 45:2	supplies [1] - 30:16	telephone [3] - 230:1, 231:12, 231:18
striking [1] - 126:12	subtotals [3] - 24:3, 24:13, 105:20	Supreme [1] - 198:17	surprise [1] - 225:17	TEMITOPE [1] - 4:8
stripped [1] - 66:22	subtract [1] - 121:8	surprise [1] - 225:17	surprising [1] - 207:18	template [1] - 99:3
strong [1] - 89:22	suburbs [1] - 21:14	surrounding [11] - 52:9, 68:19, 69:7, 69:11, 70:7, 205:12, 206:9, 206:15, 206:21, 207:3, 207:4	surrounding [11] - 52:9, 68:19, 69:7, 69:11, 70:7, 205:12, 206:9, 206:15, 206:21, 207:3, 207:4	temporarily [3] - 110:21, 125:21, 222:14
strongly [2] - 80:18, 89:24	successes [2] - 187:19, 187:21	susceptible [1] - 177:23	sustained [7] - 70:9, 105:14, 153:16, 165:13, 166:15, 167:7, 205:22	ten [8] - 47:3, 47:18, 48:5, 48:20, 49:5, 49:14, 49:17, 105:3
Strosnider [1] - 80:25	successive [1] - 73:8	suspended [3] - 222:8, 222:14, 225:8	sustained [7] - 70:9, 105:14, 153:16, 165:13, 166:15, 167:7, 205:22	ten-fold [3] - 48:20, 49:5, 49:17
structure [5] - 132:17, 133:20, 133:21, 135:19, 145:16	succinctly [2] - 233:21, 234:1	suspension [2] - 218:25, 223:1	Sustained [5] - 185:6, 188:1, 189:12, 205:19, 234:4	tended [1] - 38:5
stuck [1] - 205:23	suffers [1] - 51:21	Suspension [10] - 177:13, 190:15, 222:16, 223:9, 224:13, 225:2, 225:5, 226:6, 226:16, 231:24	Suzanne [1] - 23:19	tens [2] - 22:12, 22:14
study [2] - 9:18, 9:23	sufficiently [1] - 196:18	suspicion [3] - 178:6, 178:8, 180:11	SUZANNE [1] - 4:15	tense [1] - 134:3
stuff [4] - 86:3, 127:23, 139:6, 205:4	suggest [2] - 18:19, 81:14		swear [1] - 127:15	tentacles [1] - 147:18
sub [2] - 99:1, 157:14	suggested [1] - 82:22		Swedesboro [1] - 65:8	Tenth [1] - 5:12
sub-chapter [1] - 157:14	suggesting [2] - 89:20, 96:13		switch [3] - 23:10,	tenth [1] - 112:17
sub-set [1] - 99:1	suggestion [2] - 89:18, 90:23			tenths [3] - 114:13, 116:1, 119:19
subject [2] - 35:17, 126:7	suggests [1] - 107:1			term [2] - 133:8, 203:24
subjective [2] - 109:11, 124:18	Suite [9] - 2:4, 2:7, 2:10, 2:13, 2:16, 3:17, 4:6, 6:5, 6:12			terms [7] - 10:16,
subjectively [1] - 99:12	summaries [10] - 42:10, 82:19, 83:22, 87:16, 88:24, 89:2, 110:7, 123:2, 126:7, 126:9			
subjectivity [2] - 109:15, 110:9	summarize [1] - 112:19			
submit [3] - 82:24, 97:21, 162:10				
submitted [3] - 83:21, 123:11, 196:5				
Subsequent [1] - 225:22				
subset [5] - 110:25, 113:18, 122:20, 140:14, 230:23				
subsidiary [2] - 126:19, 150:6				
substance [7] - 27:25, 153:24, 154:3				

11:18, 12:2, 15:17, 18:1, 59:22, 120:25 terrible [1] - 78:12 tertiary [2] - 204:18, 207:25 testified [38] - 34:19, 38:18, 39:20, 47:5, 47:16, 48:2, 48:17, 50:5, 50:20, 51:6, 52:8, 61:5, 69:17, 86:6, 87:15, 93:1, 93:10, 94:6, 100:17, 102:15, 105:10, 112:25, 117:9, 119:7, 163:18, 163:21, 164:1, 164:2, 164:12, 165:20, 166:21, 168:1, 170:14, 194:22, 195:2, 207:24, 209:2, 212:13 testify [5] - 26:20, 26:25, 28:14, 95:8, 145:7 testifying [2] - 166:5, 221:2 testimony [27] - 7:22, 8:21, 39:16, 41:22, 42:4, 43:14, 52:23, 53:11, 55:7, 56:15, 70:11, 75:19, 85:11, 85:16, 95:2, 103:10, 111:13, 116:14, 126:13, 126:23, 131:10, 133:6, 165:4, 166:17, 167:5, 167:6, 206:16 Texas [2] - 65:12, 100:25 THE [244] - 1:1, 1:1, 1:4, 1:17, 7:5, 7:10, 7:11, 7:13, 8:2, 8:3, 11:7, 11:13, 11:15, 11:20, 12:8, 23:9, 23:12, 35:11, 35:17, 35:21, 35:24, 54:1, 54:5, 55:18, 55:20, 55:25, 56:20, 56:23, 56:24, 56:25, 57:1, 63:15, 63:19, 64:2, 64:4, 64:8, 64:17, 66:2, 66:3, 66:6, 66:7, 67:20, 68:13, 68:14, 68:21, 69:1, 69:22, 70:1, 70:9, 72:8, 72:10, 74:2, 74:5, 74:10, 74:12, 74:13, 74:14, 75:7, 75:16, 75:21, 76:21,	77:4, 78:8, 78:13, 79:9, 79:14, 80:20, 81:23, 83:13, 84:3, 84:13, 84:23, 85:9, 85:11, 85:14, 90:2, 90:6, 90:14, 90:19, 91:5, 91:11, 91:20, 94:20, 96:1, 96:13, 97:14, 97:22, 98:2, 98:5, 98:22, 99:1, 101:7, 105:14, 106:9, 106:13, 106:16, 106:19, 107:4, 107:11, 107:15, 109:9, 109:14, 110:10, 110:18, 111:15, 112:25, 117:9, 119:7, 163:18, 163:21, 164:1, 164:2, 164:12, 165:20, 166:21, 168:1, 170:14, 194:22, 195:2, 207:24, 209:2, 212:13 testify [5] - 26:20, 26:25, 28:14, 95:8, 145:7 testifying [2] - 166:5, 221:2 testimony [27] - 7:22, 8:21, 39:16, 41:22, 42:4, 43:14, 52:23, 53:11, 55:7, 56:15, 70:11, 75:19, 85:11, 85:16, 95:2, 103:10, 111:13, 116:14, 126:13, 126:23, 131:10, 133:6, 165:4, 166:17, 167:5, 167:6, 206:16 Texas [2] - 65:12, 100:25 THE [244] - 1:1, 1:1, 1:4, 1:17, 7:5, 7:10, 7:11, 7:13, 8:2, 8:3, 11:7, 11:13, 11:15, 11:20, 12:8, 23:9, 23:12, 35:11, 35:17, 35:21, 35:24, 54:1, 54:5, 55:18, 55:20, 55:25, 56:20, 56:23, 56:24, 56:25, 57:1, 63:15, 63:19, 64:2, 64:4, 64:8, 64:17, 66:2, 66:3, 66:6, 66:7, 67:20, 68:13, 68:14, 68:21, 69:1, 69:22, 70:1, 70:9, 72:8, 72:10, 74:2, 74:5, 74:10, 74:12, 74:13, 74:14, 75:7, 75:16, 75:21, 76:21,	190:18, 191:2, 193:9, 193:11, 196:10, 196:13, 196:16, 200:10, 200:11, 203:10, 205:19, 205:22, 207:11, 207:12, 208:24, 209:5, 209:9, 209:11, 209:13, 209:14, 209:20, 209:23, 210:4, 210:12, 210:17, 210:21, 210:24, 211:9, 211:11, 216:11, 221:4, 222:20, 223:16, 223:19, 226:1, 226:20, 226:24, 227:2, 228:18, 229:15, 229:18, 234:4, 234:15, 234:19, 237:13, 237:18 theft [1] - 136:12 thereafter [1] - 82:14 therefore [1] - 82:18 therein [1] - 210:3 they've [9] - 70:8, 80:3, 90:15, 94:6, 94:17, 148:20, 151:10, 205:20, 231:5 third [6] - 11:5, 20:10, 27:18, 27:23, 192:15, 218:17 third-party [1] - 11:5 Thomas [5] - 2:12, 170:22, 171:1, 171:11, 196:4 thousand [4] - 115:15, 115:19, 161:5 thousands [3] - 22:13, 22:14, 74:7 thousandths [1] - 22:25 Three [5] - 6:5, 103:1, 159:7, 159:8, 159:9 three [42] - 6:12, 21:8, 22:25, 35:6, 48:14, 48:19, 50:2, 54:13, 58:13, 59:10, 62:12, 63:12, 63:17, 69:13, 71:16, 81:1, 81:16, 82:1, 84:1, 88:6, 91:16, 92:7, 98:18, 101:13, 103:21, 114:3, 115:22, 123:20, 123:23, 124:7, 140:20, 141:2, 159:6, 166:1, 189:12, 190:11,	170:22, 183:20, 192:4, 192:6, 205:15, 225:9, 237:14 three-day [1] - 170:22 three-digit [2] - 48:14, 48:19 three-page [1] - 81:1 threshold [2] - 60:9, 60:10 thresholds [2] - 203:23, 204:7 throughout [2] - 9:24, 139:25 time-release [1] - 193:22 timeline [1] - 145:25 timely [1] - 232:10 timetable [1] - 84:11 TIMOTHY [1] - 5:9 tiny [1] - 40:20 title [11] - 128:8, 129:7, 129:16, 135:21, 136:21, 136:24, 148:17, 157:6, 157:8, 210:12 titled [1] - 136:9 titles [1] - 129:16 today [12] - 70:11, 78:3, 84:14, 92:13, 114:20, 131:3, 145:7, 145:10, 149:7, 154:16, 159:12, 229:3 Today [1] - 193:11 together [12] - 9:3, 36:7, 49:10, 77:13, 121:6, 121:8, 149:1, 151:1, 169:3, 169:25, 208:22, 231:2 Tom [1] - 170:25 Tomkiewicz [3] - 138:7, 138:8 tomorrow [7] - 87:20, 89:25, 90:3, 97:21, 234:16, 237:15 took [10] - 39:17, 39:20, 39:23, 105:22, 110:3, 116:4, 128:13, 145:20, 225:14, 225:21 tools [7] - 77:21, 78:2, 79:24, 80:5, 80:9, 80:19, 82:5 top [9] - 18:22, 20:4, 102:25, 133:14, 135:5, 194:24, 221:23, 224:12,	232:7 topic [5] - 38:17, 44:15, 61:2, 166:4, 166:19 topics [1] - 203:19 total [18] - 24:14, 29:11, 29:16, 32:4, 32:13, 37:3, 38:1, 38:8, 41:7, 41:16, 49:3, 52:3, 69:13, 73:12, 79:18, 102:10, 116:6, 110:7, 112:6, 119:12, 119:22, 123:17, 124:4 transcript [5] - 6:19, 171:1, 171:11, 171:15, 238:4
---	---	--	---	--

transcripts [4] - 84:15, 168:6, 168:15, 205:4	95:17, 96:3, 101:11, 101:25, 102:8, 106:20, 220:15, 220:24, 230:24	224:25 under [47] - 67:13, 84:5, 91:17, 92:8, 94:22, 102:1, 104:5, 126:7, 130:17, 135:19, 136:7, 137:17, 137:18, 141:4, 147:1, 152:1, 152:3, 152:11, 152:12, 152:23, 155:14, 156:16, 158:16, 161:10, 161:20, 161:21, 162:20, 164:12, 165:1, 168:21, 172:2, 178:23, 184:3, 188:25, 189:22, 191:12, 191:17, 202:16, 202:21, 220:9, 220:12, 224:23, 231:16, 234:25	73:6, 73:12, 103:1, 104:12, 104:23, 105:23, 106:6, 108:19, 113:10, 122:5, 223:24, 224:7, 224:15	utilized [2] - 216:5, 216:11
transfers [2] - 202:1, 202:2				V
transportation [1] - 201:23				V.A [2] - 15:3, 15:7
traveled [1] - 205:1				VA [5] - 103:10, 103:16, 103:18, 103:22, 105:1
traveling [2] - 67:25, 68:6				vacate [2] - 101:3, 102:6
treated [2] - 120:7, 182:3				vacated [2] - 101:15, 101:17
treating [1] - 111:8				vacating [1] - 102:5
treatment [2] - 52:15, 155:20				vague [2] - 179:15, 236:23
trend [2] - 49:5, 49:14				valid [1] - 221:15
trends [2] - 8:24, 9:11				validate [3] - 39:12, 39:17, 226:14
trial [9] - 27:14, 28:15, 88:7, 88:18, 89:9, 89:12, 89:13, 89:19, 205:3				variable [1] - 121:25
Trial [1] - 237:19				variables [4] - 121:5, 121:6, 121:25, 122:2
TRIAL [1] - 1:16				variation [3] - 16:24, 17:1, 17:5
trials [4] - 89:15, 89:16				various [6] - 22:6, 24:4, 28:22, 42:21, 110:25, 118:16
tried [13] - 77:10, 78:1, 79:5, 79:10, 82:1, 86:11, 87:8, 88:17, 109:15, 148:12, 210:15				vast [2] - 113:11, 113:15
trier [1] - 95:6				vault [1] - 202:14
trivial [1] - 112:20				Ventura [1] - 3:18
trouble [2] - 84:17, 95:19				verify [1] - 226:14
true [16] - 14:8, 14:15, 18:5, 18:22, 51:9, 51:25, 57:12, 57:14, 65:4, 65:8, 65:11, 89:2, 89:9, 159:12, 224:2, 224:7				version [2] - 59:7, 192:9
Trumbull [1] - 100:11				versions [1] - 55:10
trusted [1] - 216:24				versus [4] - 197:14, 197:20, 219:25
truth [4] - 209:22, 210:7, 210:23, 211:1				vertical [1] - 99:15
try [9] - 7:16, 69:20, 85:1, 94:20, 95:23, 129:17, 153:11, 181:13, 232:2				Vice [10] - 91:14, 128:8, 128:14, 129:8, 129:12, 129:18, 130:3, 135:13, 194:3, 231:12
trying [23] - 12:3, 22:22, 76:25, 77:7, 77:9, 78:5, 78:25, 79:4, 79:23, 80:7, 80:23, 81:11, 83:25, 86:7, 87:11, 88:6, 131:13, 171:5, 176:10, 186:21, 187:2, 190:17, 221:19				video [2] - 165:23, 166:24
Turn [1] - 8:12				view [5] - 116:13, 145:12, 210:7, 214:25, 219:2
turn [14] - 10:9, 10:14, 71:18, 73:17, 73:21,				vigilant [1] - 216:23
				violence [1] - 136:12
				VIRGINIA [2] - 1:1, 1:18
				Virginia [78] - 4:18, 7:3, 8:8, 11:2, 12:21, 13:2, 13:8, 13:9, 14:5, 14:6, 15:13, 15:18, 16:17, 16:21, 17:16, 18:7, 18:12, 18:24, 18:25, 19:4,

19:5, 19:9, 19:10, 19:17, 19:23, 19:24, 20:2, 21:22, 21:24, 27:18, 27:24, 28:12, 30:20, 47:25, 48:4, 48:8, 48:15, 48:25, 49:4, 51:1, 51:2, 51:7, 51:17, 53:13, 53:15, 61:15, 62:10, 62:11, 63:18, 66:22, 68:5, 68:6, 68:17, 73:10, 74:8, 103:2, 110:24, 115:23, 116:11, 119:20, 122:13, 123:3, 130:13, 130:23, 149:15, 149:16, 149:18, 149:21, 149:25, 173:3, 173:8, 173:11, 174:15, 174:20, 174:25, 207:3, 208:13	warehouse [2] - 161:7, 184:4 warned [4] - 175:2, 175:10, 224:14, 225:6 warning [1] - 126:10 warrant [1] - 218:24 Washington [9] - 2:11, 4:7, 4:14, 4:16, 5:5, 5:12, 21:13, 65:5, 112:8 watch [2] - 91:18, 205:6 watching [1] - 205:5 water [1] - 83:14 Wayne [1] - 208:16 ways [6] - 39:6, 42:22, 86:12, 110:25, 112:3, 122:9 WE [1] - 146:5 WEBB [1] - 3:11 Webb [1] - 3:12 website [8] - 7:24, 12:6, 52:12, 75:1, 75:2, 75:25, 76:1, 76:6 Wednesday [1] - 8:14 week [3] - 71:3, 71:6, 116:16 weeks [5] - 82:23, 116:14, 123:20, 123:23, 124:7 weight [12] - 40:18, 40:23, 41:5, 88:16, 89:11, 93:2, 94:18, 113:11, 118:8, 118:13, 123:2 welcome [1] - 36:4 weld [4] - 183:13, 183:14, 183:20 welded [1] - 183:12 welfare [3] - 157:16, 158:2, 217:17 well-being [3] - 174:14, 174:19 West [79] - 7:3, 8:7, 11:2, 12:20, 13:2, 13:8, 13:9, 14:5, 14:6, 15:13, 15:18, 16:16, 16:21, 17:16, 18:7, 18:12, 18:24, 18:25, 19:4, 19:5, 19:9, 19:10, 19:17, 19:23, 19:24, 20:2, 21:22, 21:24, 27:18, 27:24, 28:12, 30:20, 47:25, 48:4, 48:8, 48:15, 48:24, 49:4, 51:1, 51:2, 51:7,	51:17, 51:21, 53:12, 53:15, 61:15, 62:10, 62:11, 63:18, 66:22, 68:4, 68:6, 68:17, 73:10, 74:8, 103:1, 110:24, 115:23, 116:11, 119:20, 122:13, 123:3, 130:13, 130:23, 143:3, 149:15, 149:16, 149:17, 149:18, 149:21, 149:22, 150:1, 150:2, 150:3, 150:4, 150:5, 150:6, 150:7, 150:8, 150:9, 150:10, 150:11, 150:12, 150:13, 150:14, 150:15, 150:16, 150:17, 150:18, 150:19, 150:20, 150:21, 150:22, 150:23, 150:24, 150:25, 150:26, 150:27, 150:28, 150:29, 150:30, 150:31, 150:32, 150:33, 150:34, 150:35, 150:36, 150:37, 150:38, 150:39, 150:40, 150:41, 150:42, 150:43, 150:44, 150:45, 150:46, 150:47, 150:48, 150:49, 150:50, 150:51, 150:52, 150:53, 150:54, 150:55, 150:56, 150:57, 150:58, 150:59, 150:60, 150:61, 150:62, 150:63, 150:64, 150:65, 150:66, 150:67, 150:68, 150:69, 150:70, 150:71, 150:72, 150:73, 150:74, 150:75, 150:76, 150:77, 150:78, 150:79, 150:80, 150:81, 150:82, 150:83, 150:84, 150:85, 150:86, 150:87, 150:88, 150:89, 150:90, 150:91, 150:92, 150:93, 150:94, 150:95, 150:96, 150:97, 150:98, 150:99, 150:100, 150:101, 150:102, 150:103, 150:104, 150:105, 150:106, 150:107, 150:108, 150:109, 150:110, 150:111, 150:112, 150:113, 150:114, 150:115, 150:116, 150:117, 150:118, 150:119, 150:120, 150:121, 150:122, 150:123, 150:124, 150:125, 150:126, 150:127, 150:128, 150:129, 150:130, 150:131, 150:132, 150:133, 150:134, 150:135, 150:136, 150:137, 150:138, 150:139, 150:140, 150:141, 150:142, 150:143, 150:144, 150:145, 150:146, 150:147, 150:148, 150:149, 150:150, 150:151, 150:152, 150:153, 150:154, 150:155, 150:156, 150:157, 150:158, 150:159, 150:160, 150:161, 150:162, 150:163, 150:164, 150:165, 150:166, 150:167, 150:168, 150:169, 150:170, 150:171, 150:172, 150:173, 150:174, 150:175, 150:176, 150:177, 150:178, 150:179, 150:180, 150:181, 150:182, 150:183, 150:184, 150:185, 150:186, 150:187, 150:188, 150:189, 150:190, 150:191, 150:192, 150:193, 150:194, 150:195, 150:196, 150:197, 150:198, 150:199, 150:200, 150:201, 150:202, 150:203, 150:204, 150:205, 150:206, 150:207, 150:208, 150:209, 150:210, 150:211, 150:212, 150:213, 150:214, 150:215, 150:216, 150:217, 150:218, 150:219, 150:220, 150:221, 150:222, 150:223, 150:224, 150:225, 150:226, 150:227, 150:228, 150:229, 150:230, 150:231, 150:232, 150:233, 150:234, 150:235, 150:236, 150:237, 150:238, 150:239, 150:240, 150:241, 150:242, 150:243, 150:244, 150:245, 150:246, 150:247, 150:248, 150:249, 150:250, 150:251, 150:252, 150:253, 150:254, 150:255, 150:256, 150:257, 150:258, 150:259, 150:260, 150:261, 150:262, 150:263, 150:264, 150:265, 150:266, 150:267, 150:268, 150:269, 150:270, 150:271, 150:272, 150:273, 150:274, 150:275, 150:276, 150:277, 150:278, 150:279, 150:280, 150:281, 150:282, 150:283, 150:284, 150:285, 150:286, 150:287, 150:288, 150:289, 150:290, 150:291, 150:292, 150:293, 150:294, 150:295, 150:296, 150:297, 150:298, 150:299, 150:300, 150:301, 150:302, 150:303, 150:304, 150:305, 150:306, 150:307, 150:308, 150:309, 150:310, 150:311, 150:312, 150:313, 150:314, 150:315, 150:316, 150:317, 150:318, 150:319, 150:320, 150:321, 150:322, 150:323, 150:324, 150:325, 150:326, 150:327, 150:328, 150:329, 150:330, 150:331, 150:332, 150:333, 150:334, 150:335, 150:336, 150:337, 150:338, 150:339, 150:340, 150:341, 150:342, 150:343, 150:344, 150:345, 150:346, 150:347, 150:348, 150:349, 150:350, 150:351, 150:352, 150:353, 150:354, 150:355, 150:356, 150:357, 150:358, 150:359, 150:360, 150:361, 150:362, 150:363, 150:364, 150:365, 150:366, 150:367, 150:368, 150:369, 150:370, 150:371, 150:372, 150:373, 150:374, 150:375, 150:376, 150:377, 150:378, 150:379, 150:380, 150:381, 150:382, 150:383, 150:384, 150:385, 150:386, 150:387, 150:388, 150:389, 150:390, 150:391, 150:392, 150:393, 150:394, 150:395, 150:396, 150:397, 150:398, 150:399, 150:300, 150:301, 150:302, 150:303, 150:304, 150:305, 150:306, 150:307, 150:308, 150:309, 150:310, 150:311, 150:312, 150:313, 150:314, 150:315, 150:316, 150:317, 150:318, 150:319, 150:320, 150:321, 150:322, 150:323, 150:324, 150:325, 150:326, 150:327, 150:328, 150:329, 150:330, 150:331, 150:332, 150:333, 150:334, 150:335, 150:336, 150:337, 150:338, 150:339, 150:340, 150:341, 150:342, 150:343, 150:344, 150:345, 150:346, 150:347, 150:348, 150:349, 150:350, 150:351, 150:352, 150:353, 150:354, 150:355, 150:356, 150:357, 150:358, 150:359, 150:360, 150:361, 150:362, 150:363, 150:364, 150:365, 150:366, 150:367, 150:368, 150:369, 150:370, 150:371, 150:372, 150:373, 150:374, 150:375, 150:376, 150:377, 150:378, 150:379, 150:380, 150:381, 150:382, 150:383, 150:384, 150:385, 150:386, 150:387, 150:388, 150:389, 150:380, 150:381, 150:382, 150:383, 150:384, 150:385, 150:386, 150:387, 150:388, 150:389, 150:390, 150:391, 150:392, 150:393, 150:394, 150:395, 150:396, 150:397, 150:398, 150:399, 150:300, 150:301, 150:302, 150:303, 150:304, 150:305, 150:306, 150:307, 150:308, 150:309, 150:310, 150:311, 150:312, 150:313, 150:314, 150:315, 150:316, 150:317, 150:318, 150:319, 150:320, 150:321, 150:322, 150:323, 150:324, 150:325, 150:326, 150:327, 150:328, 150:329, 150:330, 150:331, 150:332, 150:333, 150:334, 150:335, 150:336, 150:337, 150:338, 150:339, 150:340, 150:341, 150:342, 150:343, 150:344, 150:345, 150:346, 150:347, 150:348, 150:349, 150:350, 150:351, 150:352, 150:353, 150:354, 150:355, 150:356, 150:357, 150:358, 150:359, 150:360, 150:361, 150:362, 150:363, 150:364, 150:365, 150:366, 150:367, 150:368, 150:369, 150:370, 150:371, 150:372, 150:373, 150:374, 150:375, 150:376, 150:377, 150:378, 150:379, 150:380, 150:381, 150:382, 150:383, 150:384, 150:385, 150:386, 150:387, 150:388, 150:389, 150:380, 150:381, 150:382, 150:383, 150:384, 150:385, 150:386, 150:387, 150:388, 150:389, 150:380, 150:381, 150:382, 150:383, 150:384, 150:385, 150:386, 150:387, 150:388, 150:389, 150:380, 150:381, 150:382, 150:383, 150:384, 150:385
--	---	---

174:8, 176:9,
177:10, 179:5,
180:18, 181:18,
183:4, 189:21,
191:15, 193:10,
196:24, 197:5,
203:3, 203:8,
211:20, 220:20,
221:13, 222:22,
226:9, 228:22,
228:25, 231:12,
234:23, 237:1

Zimmerman" [1] -

135:6

zip [6] - 10:10, 10:11,
48:14, 48:19, 50:2,
50:14